Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

BRIAN M. PURICELLI
PETITIONER,

v.

MORRISVILLE BOROUGH, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED

1. WHETHER THE COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR THE APPELLEES BY FINDING THAT THE APPELLANT FAILED TO ESTABLISH A TANGIBLE LOSS IN ORDER TO SATISFY THE SECOND PRONG OF A STIGMA PLUS CLAIM OF DEPRIVATION TO A LIBERTY INTEREST WHEN THE APPELLANT'S EVIDENCE SUBMITTED SHOWED HE WAS A PUBLIC EMPLOYEE, SUSPENDED WITHOUT PAY, PUBLICLY ACCUSED BY HIS EMPLOYER OF BEING INVOLVED IN A POLICE SET UP INVOLVING THE ARREST OF A GOVERNMENTAL COUNCIL PERSON FOR SPEEDING, DRIVING UNDER THE INFLUENCE OF ALCOHOL OR CONTROLLED SUBSTANCE AND POSSESSION OF NARCOTICS WHEN THE PARTY ACCUSED ADMITTED SPEEDING AND DRINKING AND A BACK-UP OFFICER DISCOVERED THE NARCOTICS AND HE WAS CLEARED BY THE DISTRICT ATTORNEY'S OFFICE?

2. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S GRANTING OF SUMMARY JUDGMENT FOE THE DEFENDANTS ON THE ISSUE OF WHETHER APPELLANT HAD A RIGHT TO DUE PROCESS HEARING TO CLEAR HIS NAME FOR A DEPRIVATION OF A STATE FUNDAMENTAL REPUTATION INTEREST, LIBERTY INTEREST, AS SECURED UNDER THE DUE PROCESS CLAUSE OF THE UNITED STATES, PAUL DECISION, AND PROPERTY INTEREST IN EMPLOYMENT, UNDER THE FEDERAL & STATE CONSTITUTIONS AND STATE STATUTORY PROVISION WHICH REQUIRE DUE PROCESS?

3. WHETHER SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED TO THE DEFENDANTS FOR A SECTION 1983 VIOLATION AND A PRIVACY INTEREST FOUND IN APPELLANT'S FEDERAL YOUTH CORRECTIONS INFORMATION WHICH WAS UNDER FEDERAL SEAL AND CONTROL, AND WHICH WAS NOT BE DISCLOSED ABSENT COMPLIANCE WITH FEDERAL REGULATION AND SOME REVIEW AND SHOWING OF NEED WHEN THE EVIDENCE ESTABLISHED THAT APPELLEES' DISSEMINATED SEALED YOUTH CORRECTION RECORDS AND OTHER PERSONNEL AND FAMILY INFORMATION TO THE GENERAL PUBLIC, LAW ENFORCEMENT AGENCIES AND APPELLANT'S EMPLOYER BY THE APPELLEES WHO WERE ACTING UNDER COLOR OF STATE LAW; AND WHILE KNOWING THERE WAS A FEDERAL COURT ORDER PRECLUDING DISSEMINATION.

4. WHETHER SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED TO THE APPELLEES AND APPELLANT'S COMPLAINT DISMISSED FOR FAILING TO HAVE A COGNIZABLE ACTION UNDER SECTION 1983 WHEN THE DISTRICT COURT FAILED TO ADDRESS AND/OR DISPOSE OF APPELLANT'S FIRST AMENDMENT CLAIMS, WHEN SUCH CLAIMS WERE NOT CHALLENGED AND THE ONLY EVIDENCE BEFORE THE COURT SHOWED THAT APPELLEES COMMENCED A CRIMINAL INVESTIGATION WITH HOURS OF APPELLANTS REPORTS THAT HE WAS TO DISCLOSE TO FEDERAL LAW ENFORCEMENT OFFICIALS INFORMATION CONCERNING POLICE CORRUPTION BY APPELLEE HUGHES, AND OTHER, AND WITHIN WEEKS OF THE DISCLOSURE TO THE FEDERAL AGENCIES APPELLEES CONVENED A SECRET GRAND JURY TO INVESTIGATE APPELLANT, THEN USED THE IGJ POWERS TO FORCE APPELLANT'S PRESENT AND FORMER EMPLOYERS TO PRODUCE PERSONNEL FILES TO THE DISTRICT ATTORNEY?

5. WHETHER THERE IS A COGNIZABLE CIVIL RIGHTS ACTION UNDER 42 U.S.C. 1983 FOR AN ABUSE OF PROCESS AND MALICIOUS USE OF PROCESS WHEN THE FACTS ARE: APPELLEES INITIATED A CRIMINAL INVESTIGATION WITHIN HOURS OF APPELLANTS DISCLOSURE OF REPORTING POLICE AND PROSECUTOR CORRUPTION TO THE UNITED STATES ATTORNEY GENERAL AND FEDERAL BUREAU OF INVESTIGATION, AND THE INITIATORS OF THE INVESTIGATION WERE THE SUBJECT OF THE CORRUPTION DISCLOSURES, AND THESE INDIVIDUALS HAD NO REASONABLE SUSPICION OR BELIEF TO ESTABLISH THAT APPELLANT HAD COMMITTED ANY CRIME, THAT WITHIN WEEKS OF CONVENING A INVESTIGATORY GRAND JURY ALL INFORMATION LEANED INDICATED APPELLANT HAD COMMITTED NO CRIMES, BUT DESPITE SUCH THE APPELLEES CONTINUED THEIR INVESTIGATION FOR THIRTEEN MONTHS, ISSUED SUBPOENAS AND SEIZES APPELLANTS PERSONNEL FILES FROM FORMER AND CURRANT EMPLOYERS, RELEASE THE INFORMATION TO THE GRAND JURY, OTHER LAW ENFORCEMENT A OFFICIALS, THE GENERAL PUBLIC SEALED, AND APPELLANT'S EMPLOYERS ALL WHILE KNOWING THE RELEASE WAS IN VIOLATION OF STATE SECRECY LAWS AND A FEDERAL COURT SEALING ORDER?

6. WHETHER AN APPEARANCE OF IMPARTIALITY RESULTED, AND THE DISTRICT COURT JUDGE SHOULD HAVE RECUSED HERSELF, WHEN A PARTY TO THE ACTION, APPELLEE RUBENSTEIN, NOTIFIED THE COURT, (WHICH HAD JUST RECENTLY RECEIVED THE CASE) AND ALL THE PARTIES, THAT HE AND THE DISTRICT JUDGE HAVE HAD SEVERAL PRIOR CONTACTS WITH ONE ANOTHER, BUT PRIOR TO AND OUTSIDE THE PROCEEDINGS BEFORE THE COURT, AND INSTEAD OF HOLDING A RECORD CREATING HEARING ON THE ISSUE, THE COURT OFF THE RECORD, IN CHAMBERS AND AT A STATUS CONFERENCE, HOLDS DISCUSSION ON THE RELATIONSHIP ISSUE AND DECIDES TO NOT RECUSE HERSELF?

7. WHETHER THE COURT ERRED IN NOT HEARING THE STATE PENDENT CLAIMS WHEN AT THE TIME THE COMPLAINT WAS FILED THERE WAS COMPLETE DIVERSITY OF CITIZENSHIP AND A GOOD FAITH PLEADING OF THE BELIEF THAT DAMAGES EXCEEDED $50,000.00 AND DIVERSITY OF CITIZENSHIP WAS RAISED AS SUBJECT MATTER JURISDICTION IN THE COMPLAINT.

8. WHETHER A PART-TIME POLICE OFFICER HAS A CONSTITUTIONALLY PROTECTABLE PROPERTY INTEREST IN HIS EMPLOYMENT WHEN STATE LAW SETS FORTH THAT NO ACTION TAKEN BY GOVERNMENT MAY BE VALID UNLESS THE INDIVIDUAL FOR WHICH THE ACTION IS GOING TO BE TAKEN AGAINST IS FIRST PROVIDED NOTICE AND OPPORTUNITY TO RESPOND, AND FURTHER SPECIFIC STATE LAW STATES THAT NO SUSPENSION, REDUCTION OR TERMINATION MAY OCCUR BEFORE NOTICE AND HEARING ARE HELD, AND THE OFFICER REQUESTS A HEARING ON HIS SUSPENDED WITHOUT PAY, THE SUSPENSION FOLLOWS A PUBLIC ACCUSATION BY THE GOVERNMENT BODY THAT AN ORDERED ARREST WAS A POLICE SET-UP AND THE OFFICER IS DENIED A HEARING BECAUSE HE DOES NOT BELONG TO A COLLECTIVE BARGAINING UNIT?

9. WHETHER A PART-TIME OFFICER OF A BOROUGH WHICH HAD ONLY TWO FULL TIME POLICE OFFICERS WORKING AT THE TIME OF THE PART-OFFICER WAS HIRE HAS A PROTECTED PROPERTY INTEREST IN HIS EMPLOYMENT AND IS ENTITLED TO DUE PROCESS UNDER THE POLICE TENURE ACT, 53 P.S. 811 ET. SEQ.?

10. WHETHER RES JUDICATA AND ISSUE PRECLUSION BAR FURTHER DETERMINATION BY ANOTHER TRIAL COURT TO FACTS AND ISSUES WHICH WERE FULLY DETERMINED TO FINALITY, ON THE MERITS AND WITH OPPORTUNITY TO PARTICIPATE, WHEN IN A PENDING CIVIL RIGHTS ACTION THERE INVOLVES SOME NEW PARTIES AND ISSUES BUT MOST OF THE PARTIES AND ISSUES ARE THE SAME AND CONCERN THE RIGHT TO DUE PROCESS UNDER A STATE STATUE, AND THE ISSUE IN THE PENDING CIVIL RIGHTS ACTION WAS DETERMINED TO FINALITY BY AN ADMINISTRATIVE AGENCY WHICH RENDERED "FINDINGS AND CONCLUSIONS OF LAW ON THE MERITS?

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REFERENCE TO OFFICIAL AND UNOFFICIAL OPINIONS

Found at pages 1 through 105 of Appellant's Appendix are the official and unofficial opinions which have been rendered and/or concern the presented Writ. At page 1 of Appellant's Appendix is the Third Circuit's April 11, 1994 Memorandum Order which affirms the District Courts September 7, 1993, and April 16, 1993 Orders (Appendix pages 9-75). At page 75 is the November 16, 1978 Eastern District Court's order discharging Appellant from Probation and setting aside the conviction. At pages 76-77 is the April 14, 1983 District Court order which seals the November 16, 1978 matter and at pages 78-88 is the July 31, 1991 District Court permanent injunction issued over the November 16, 1978 and April 14, 1983 matters. At pages 89-105 are the 1988 Finding and Conclusion of Law found by Wrightstown Township.

STATEMENT OF JURISDICTION

This Writ of certiorari is from a April 26, 1994 decision of the Third Circuit Court of Appeals affirming the United States District Court decisions of April 16, 1993, and September 7, 1993. No rehearing was requested on the Third Circuit's decision and there is no state court decision to be reviewed, nor order involving any extension of time. Jurisdiction is granted to this Court pursuant to 28 U.S.C.A. 1254(1) and United State Supreme Court Rule 13.

Federal jurisdiction was conferred upon the District Court pursuant to 42 U.S.C. 1983 and 28 U.S.C. 1331, Federal Question and 28 U.S.C. 1332 Diversity of Citizenship, as there were federal questions involving federal statutes, regulations and the United States Constitution, to wit; First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments. State constitutional and law questions are involved, and at the time the Complaint was filed there was complete diversity of citizenship between the parties with a good faith claim of damages

in excess of Fifty Thousand ($50,000.00) Dollars. Appellate jurisdiction was conferred upon the Third Circuit Court of Appeals pursuant to 28 U.S.C. 1291, the Federal Rules of Appellate Procedure 4 and Local Appellant Rule 34.1(a).

UNITED STATES AND CONSTITUTIONAL PROVISIONS STATUTES

Those Constitutional, statutory and regulatory provisions relied upon in this matter are reproduced in the Appendix at pages 106-127.

FEDERAL STATUTES AND REGULATIONS

5 U.S.C. 552

18 U.S.C. 5021 et. seq. (now repealed)

28 U.S.C. 455

28 U.S.C. 534

28 U.S.C. 1291

28 U.S.C. 1331

28 U.S.C. 1332

28 U.S.C. 1367 (c)(3)

42 U.S.C. 1983

42. U.S.C. 1988

28 C.F.R. 20.1 et seq.

28 C.F.R. 20.33

PENNSYLVANIA CONSTITUTIONAL AND STATUTORY PROVISIONS

Pennsylvania Constitution, section 1 and 8.

2 Pa C.S.A. 101 et. seq.

43 P.S. 1101.101, Article I

53 P.S. 811 et seq.

53 P.S. 11301 et seq.

53 P.S. 46171

STATEMENT OF CASE

On or about July 1979 Appellant after taking a civil service exam commenced employment as a police office with Morrisville Borough. On or about January 194 Appellant was dismissed without notice of causes supporting the dismissal or a hearing. On or about February, 1989 Appellant was hired as a police office by Wrightstown Township and obtained tenure protection under the Police Tenure Act. During Appellant's tenure with Wrightstown he also became a member of the Yardley Police Department. At the time of Appellant's hiring by Yardley there were only two (2) full time police officers on the force, thus, civil service requirements were not applicable, but

instead the Police Tenure Act. Appellant was dismissed from Wrightstown and suspended from Yardley without being afforded pre-termination and suspension due process.

On or about February 16, 1988 Appellant per standard operating procedure informed Appellees Cronlund and Donate, Township Supervisors of Wrightstown Township, that he was scheduled to provide to the United States Attorney General Office, Federal Bureau of Investigation and State Attorney Generals Office information on police corruption. The information concerned the Chief of Police for Wrightstown Township, Appellee Walter Hughes, and also related to District Attorney Alan Rubenstein, Appellee Rubenstein here and the District Attorney for Bucks County, Pennsylvania. (Also an Appellee herein.) On February 17, 1988 (at or about 7 p.m.) Appellee Wrightstown Supervisors met with Hughes and informed him of Appellants schedule and the topic. On February 18, 1989 (at or about 8 a.m.) Appellee Hughes commenced a

criminal investigation against Appellant accusing Appellant of unspecified criminal acts. Appellant inquired what the illegal conduct was, Appellle Hughes stated he did not know, bit later Appellle Hughes stated Appellant was involved as a conspirator in a "chop Shop" scheme. Appellee Hughes during the investigation forced Appellant to submit to fingerprinting and sought consent to conduct a background check. The request was denied in writing; however, Appellee Hughes, nevertheless, conducted the background check. Appellant Hughes also cut Appellant's hours and job duties. Appellee Hughes obtained sealed and ancient criminal history informtion from the background check. Thereafter, and with the sealed ancient information, sought and obtained the aid of Appellee District Attorney Rubenstein, First Assistant Reichely, Armitage and Brosha; these individuals commenced a county investigation which included a secret investigative grand jury.

From the onset of the investigation Appellant became aware of the investigation and efforts of the Appellee. Further, once the investigation commenced Appellee Hughes reduced Appellant's police status, to wit; modified Appellant's investigative responsibilities and powers. Also, as a result of the investigation Appellant's State Electronic Surveillance authority was removed without the mandates notice and hearing requirements set forth under state code regulation. Further, such action was taken despite the fact that within a few weeks of the investigation it was apparent that no criminal activity had been committed by Appellant or anyone. And, despite there being no evidence to believe Appellee Hughes' accusation of criminal activity by Appellant, Appellees continued to investigate Appellant and a Mr. Garner, utilizing all the power and authority of a investigative grand jury to subpoena and obtain records and information they would not be entitled to obtain without

first obtaining Appellant's consent or by satisfying the mandates of the Fourth Amendment, as well as state and federal statutes and regulations, and a federal court order. The aforementioned investigation lasted from February 1988 to May, 1989, and during this time, and continuing to July, 1990 the Appellees, via systematic and deliberate actions, and while acting in their official status, collected personnel and sealed court documents; thereafter, released the information and informed members of the general police and public communities, Appellant's employers and the Pennsylvania State Police that Appellant was not fit to be a police officer because he was a convicted drug smuggler. As a result, inter alia, Appellant investigative duties were removed by Wrightstown, the Pennsylvania State Police removed a license to conduct wire surveillance, Appellant's reputation in the police community was seriously damages, and

Appellant was not offered a position with the District Attorney Office.

On or about April 5, 1989 Appellant learned of the disseminations, and sought relief from the Honorable John B. Hannum of the United States District Court for the Eastern District of Pennsylvania (the authority which deleted and/or sealed respectively the court and FBI records and YCA information). A hearing was held and Appellee Reichely (Assistant District Attorney for Bucks County) testified that the Appellees were aware of the sealing and set aside orders, that his office was not disclosing the sealed YCA information and that his office was complying with the federal sealing order by seeking from federal authorities access to the information. However, John Pucci, Assistant U.S. Attorney, could not confirm this, but did state that his Office and the FBI were not releasing the sealed information. During discovery Appellee District Attorney's Office records, and a letter from the United States

District Attorney's Office, showed that Appellee Reichely's testimony was not correct, and in fact the Appellees had been disseminating the information and had not sought access to the sealed information prior to the hearing. Discovery further showed that the United States Attorney Office on or about April 25, 1989, or twenty days after Appellee Reichely testified, was approached for access; that access was subsequently denied (because the Appellees could not show the necessary need for access) and that the Appellees were informed by the United States Attorney's Office that based on the information they provided for cause to gain access it was determined by the U.S. Attorney's Office that access was not permitted and because the Appellant was not, and had not, violated any laws. Despite such, the Appellees continued the investigation and disclosures. On or about April of 1990, Appellees discontinued their investigation and no indictment was provided by the Investigative Grand Jury.

On or about January, 1989 the Wrightstown Township Police Department was disbanded and Appellant was terminated. He was not provided notice or charges and he was the only member of the Police Department not provided severance pay. The Department maintained that Appellant resigned when he turned in his key; however, Appellant still has his keys, and subsequent to the Department's taking the resignation position it sought from appellant via 2 letters his keys. The disbanding was not for economic reasons but was because of the false accusation made by Appellee Hughes.

On July 11, 1989 Appellant while acting as a police officer for Appellee Yardley Borough stopped Appellee Taylor for speeding and suspicion of driving under the influence of alcohol. Controlled substances were found incidental to the DUI arrest, and the controlled substances were discovered by a backup office. Appellee Taylor later reported to the newspaper and Yardley Borough Council that she was set up. Both Appellee Taylor and

Yardley Borough published the accusation and the subsequent suspension in the local papers. Appellee Taylor admitted drinking and speeding, a breath test indicated she had been drinking, and she has stated she is not accusing the Appellant of "setting her up".

Prior to Appellee Taylor's arrest, but subsequent to the detention for the alcohol breath test, supervisory personnel were called in by Appellant, per S.O.P. supervisory personnel included Appellee Robinson, Mayor of the Borough, who was the Head of the Department. Appellee Robinson, with the Officer in Charge, investigated the stop and detention and after such ordered the arrest made. Also contacted was the District Attorney's Office, which also authorized the arrest. Appellant two days later was suspended from duty without pay. Appellant, requested a hearing but was denied one. The Appellee's requested the District Attorney investigate the arrest, which was done. The District Attorney, Appellee Rubenstein, in local

newspaper and electronic media, reported Appellant had done something wrong and dropped the charges against Taylor. Appellee Yardley contend that Appellant is not entitled to a hearing on the suspension because he is not a member of the collective bargaining agreement. Appellee Yardley also state that the suspension will remain in effect until the District Attorney completed his investigation. On or about April 1993 the back up officer who discovered the controlled substance was publicly cleared, no charges have been filed, nor does any evidence exists to support the accusations of Appellee Taylor. However, despite requests for reinstatement and/or a hearing Appellee Yardley will provide neither.

On December 27, 1989 Appellant, then domiciled in the State of Michigan commenced in the United States District Court for the Eastern District of Pennsylvania the now appealed civil action, alleging both federal and state constitutional rights violations as well as various state causes of action. On

April 20, 1993 and September 7, 1993 summary judgment was granted to all defendant for the civil right allegations and Appellant was directed to commence in state court those state causes of action brought with the federal complaint. Appellant appealed to the Third Circuit Court of Appeals; however, jurisdiction was denied because there was a pending motion for reconsideration. Five months later the District Court granted summary judgment again and Appellant appealed. Appellant prior to the Third Circuit dismissing the April, 1988 appeal filed his brief and Appendix, and when the September, 1988 Appeal was filed incorporated the first filing in the second appeal. The Third Circuit on April 26, 1994 affirmed the District Court, but in doing so stated it would not review the incorporated filings, but for one issue; Thus, it declined to address the issues presented in the filings.

CONCISE ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF THE WRIT

Allowance of this Writ should be granted as the matter involves important issues over constitutional rights, use of Section 1983 and federal law and regulations implemented to provide privacy in federally collected and maintained record information. The law created will not simply effect Appellant but all citizens. More so, this case involves an important issue of what effect will result, if any, to the Paul v. Davis, "stigma-plus" standard when a state constitution does afford heightened protection in ones "reputation" by making it a fundamental right. This Writ seeks acceptance from a decision of the District Court for the Eastern District of Pennsylvania and the Third Circuit Court of Appeals affirmation which interpret a state constitutional provision and which differ from decisions of the United States Supreme Court, other circuits and the highest Courts of last resort for the Commonwealth of Pennsylvania, to wit; the Supreme Court and Commonwealth

Court. Further, the decisions of the appealed District Court differs from the opinion of another Judge in the same District who had two years earlier rendered an opinion and order on some of the same matters between some on the same parties. The Writ also concerns an Agency Finding and Conclusion of Law.

The decisions of the District Court and Appeals Court involved important State and Federal rights under the respective Constitutions, and the decisions reached by the courts below depart from the long established law set forth by the State's Supreme Court. This Writ should be granted to address not only those federal statutes and regulations designed to afford citizens of the United States privacy, and the free speech and recusal issue; but, also to address the State constitutional recognition that reputation is a fundamental right, which both the District Court and Third Circuit failed to recognize. As such, and because the Court of Appeals failed to administer justice by reviewing all

the issues, and because the courts below departed from usual judicial proceedings, this Court should accept the Writ under its supervisory powers.

Paul v Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976) insures that due process must be provided when liberty is deprived by government. Although, this Court found in Paul that reputation was not a federally protectable interest -- because Kentucky only affords state tort law protection -- this Court nevertheless recognized in Paul, and its progeny, that a citizens liberty interest is affected when government stigmatizes its citizens. Thus, Paul held that in a "stigma plus" situation due process, or a name clearing hearing, must be afforded a citizen pursuant to the Due Process Clause.

As stated, Paul held that under Kentucky's constitution, "reputation" was not recognized as a fundamental right, thus all protection afforded to Kentucky citizens are

found in Kentucky's tort law. However, the same is not true in Pennsylvania, for the Pennsylvania Constitution provides, and the Pennsylvania Supreme and Commonwealth Court both made clear, that in Pennsylvania a citizen's reputation is elevated to the status of a fundamental right, and it is "in the same class with Life, Liberty and Property, which cannot be abridged by government without compliance with State constitutional standards of due process and equal protection. Consequently, we conclude that reputation is a fundamental right under the Pennsylvania Constitution and is entitled to protection of procedural due process even in the absence of a more 'tangible right'." (see Hatchard v. Westinghouse Broadcasting, 516 Pa. 184, 532 A.2d 347 (1987) and Pennsylvania Bar Ass'n v. Commonwealth of Pennsylvania, 607 A.2d 850 (Pa Comnwl 1992.).

The District Court's statement, in granting summary judgment, was that Hatchard and PBA "could" created a liberty interest

test (see app. 59), is incorrect, at best, and disingenuous. The Commonwealth Court of Pennsylvania, in PBA, interpreted the Pennsylvania Supreme Court Hatchard decision, analyzed the "reputation-plus" test and concluded, at foot note seven (n.7), that "[w]ere reputation not a fundamental right under the Pennsylvania Constitution we believe PBA would be entitled to a review under Paul 'reputation-plus' standard." (Emphasis added). When Judge Anita Brody rendered her opinion, and granted summary judgment for the Appellees, on the issues of deprivation of liberty, due process and a fundamental right in "reputation, she was not free to change the clear meaning of the rulings of Pennsylvania's highest courts in order to meet her needs to grant summary judgment for the Appellees. For, it is axiomatic that in matters of substantive law the federal courts must defer to the law of the highest state courts -- were the federal court sits -- when rendering decisions such as this. Pennsylvania's highest courts

have determined that prior to government depriving a citizen of a fundamental right, such as reputation, it must afford constitutionally valid procedural due process. The decisions of the District Court and Court of Appeals are contrary to the Hatchard and PBA decision, thus it was plain error for the District and Appeals Court not to recognize the mandates of Pennsylvania's highest courts, and because of the importance of this issue this Court should grant this Writ, and determine what, if any, effect results on the "stigma plus" Paul analysis when the state's constitution recognizes reputation as a fundamental right.

As mentioned, Paul recognizes that due process is required under the liberty prong of the Fourteenth Amendment when government stigmatizes a citizen. Here, the District Court and Third Circuit erroneously determined that "reputation" was not a "fundamental right", however, they both agreed under the Paul test, Appellant was able to prove the

first prong, but that he had not shown a "tangible loss" (status change or damages), thus Appellant failed to satisfy the second prong. However, both courts erred for they did not either examine the evidence or did not apply the standard of review for Motions for Summary Judgment. The record shows that Appellant did provide evidence of a tangible loss, to wit, loss of pay, and a status change in duties and position. And, in fact to this date Appellant continues to be suspended -- without pay. Further, in Parker v. Ellis, 362 U.S. 547, 593-94, 80 S. Ct. 909, 920, 4 L. Ed. 2d (1960) Chief Justice Earl Warren wrote in his dissenting opinion that a "Conviction of a felony imposes a *status* change upon a person which not only makes him vulnerable to future sanctions ... but which also seriously affects his reputation and economic opportunities." See also Dow v. Webster, infra, f.n. 51, page 1239. As such, this court should grant the Writ, not solely to determine whether Appellant provide sufficient evidence of a

tangible loss to survive a summary judgment motion, but because both the District Court and the Third Circuit failed and/or refused to recognize Appellant's evidence, and to viewed it in a light most favorable to him, (see Appendix 104-123). Therefore, this Court should grant this Writ under its supervisory powers.

This court should grant the Writ not solely because Pennsylvania recognizes reputation as a fundamental right, PBA, supra, but because it also involves a recognized constitutionally protectable privacy interest. Both the Pennsylvania and Federal judiciary have recognized that there are protected privacy interests in criminal history information. In particular, where no conviction exists, where the information is ancient, where the matter involves records sealed by two different Federal Judges of the same District and where disclosure is precluded by both Federal and State

regulations and statutes. See United States Department of Justice v Reporters Committee for Freedom of the Press, 109 S. Ct. 1468 (1989). This Honorable Court held in United States Department of Justice that, disclosure of contents of an FBI rap sheet to third persons could reasonably be expected to constitute an unwarranted invasion of personal privacy. This Court also "pointed out" in United States Department of Justice that "privacy encompasses the individual's control of information concerning his or her person." Congress, too, sought to control government's collection, classification, preservation and exchange of criminal history information on citizens, and did so by enacting 28 U.S.C. 534 which is the basis for the U.S. Governments authority to acquire collected, stored and disseminated information on citizens. Congress also when enacting Section 534 mandated that the "Administration assure that the 'privacy' [in] the information is adequately protected." Thus, the Department of Justice created

regulation to insure that a citizens privacy interest in the information is protected. The U.S. Department of Justice promulgated 28 CFR 20.1 et. seq., and specifically, Sub-part A 20.21(b) et. seq., to fulfill Congress' mandate and this sub-part provides the specific conditions and reasons that federally acquired, collected, stored and disseminated information may be released and used. (see 28 U.S.C. 534 & 28 CFR 20.01 et seq, appendix pages 125, 131-147).

In Briscoe v. Reader's Digest Ass'n, 93 Cal. Rptr. 866, 483 P.2d 34 (1971) the issue of privacy and stale criminal history was discussed. That Court, relying on section 867 of the Restatement of Torts, held that, "where a man has reverted to a lawful life he no longer need satisfy the curiosity of the public". The Pennsylvania courts in ruling on this issue firmly stated in Jenkins v. Bolla, 600 A.2d 1293 (Pa Super. 1992) held that,

> A public record can fade into a private fact thereby losing its protected status with regards to invasion of

> privacy and dissemination of information ... unless some compelling reason warrants maintaining an ancient record ... a matter of public interest does not mean ... mere curiosity. Id. at pg. 1296-7.

In the instant matter the District Court found no federal law or regulation existing to grant Appellant any privacy interest in the information, despite the above law and the Honorable Judge Shirpro, of the same District, finding in 1991 to the contrary (see Appendix pg 91-104) It is egregious enough for government to deprive a citizen of a state recognized fundamental right, and due process, but to also use its state police powers to collect federally sealed criminal history information, then disclose this incorrect and sealed Youth Correction information to the public and citizen's employer, all while knowing such will not only harm a citizen's reputation and ability to continue in a chosen livelihood, but to also knowingly violate the law and knowingly and intentionally misrepresenting to a District Court that it is

not doing such things is simply unconscionable.

The privacy issue in this Writ not only ties in neatly with Pennsylvania's recognition that "reputation" is a fundamental right, but it concerns the basic need for some protection from government's unfettered invasion of a citizen's right to be left alone. (See, Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678 (1965)) The information the state seized under it process was federally acquired, collected, stored and regulated. The information was seized in violation of federal law and a District Court sealing Order, and when the state was confronted with their egregious and unlawful acts they intentionally failed to disclose to the bench what was in fact occurring. This conduct cannot be allowed to exist. Appellant believes that this Court should grant this Writ, for what could be more damaging to a citizen's reputation and privacy interests than allowing an unchecked government to maliciously, and for no

compelling reason, use state process to seize and disseminate federally acquired, collected, stored and sealed information, which is under direct federal regulation, to the public, state grand jury and a citizen's employer, all in violation of this Courts and Congress' mandates, a District Court sealing order and the regulations created by the Agency in charge of overseeing this information. Moreover, what compelling reason could a state offer to explain the above conduct when the information is known by the state to be sealed and nearly twenty years old? More so, what compelling reason could any state offer for releasing federally regulated and sealed information on a citizen to the general public and citizen's employers. Even more so, what valid compelling reason could be offered here for the Appellees releasing the federally sealed and regulated information, when the conviction was known to have been set aside, pursuant to the YCA, and sealed pursuant to federal court order, and thus "for all intent

and purposes the conviction never existed." (see Doe v. Webster, 606 F.2d 1226 (D.C.Cir. 1979).) And finally, what compelling reason could be offered for the state misinforming a U.S. District Judge that they were not doing these acts, when in fact they were. As such, this court should grant this Writ to determine if Appellant has a federally protectable interest in non disclosure of federally acquired, regulated and sealed information.

The Honorable Norman Shapiro, E.D. Pa., in 1988 was faced with similar facts as the below District Judge. Judge Shapiro case involved some of the same Appellees, but Judge Shapiro, in 1991, found that Appellant's evidence was so compelling that she granted Appellant extraordinary relief, to wit; a permanent injunction sealing public documents created at trial. (see Shapiro Order, App. pg.78-88.). Further, in deciding the issue of privacy the District Court and Third Circuit did not apply applicable standard of review when ruling on the Appellees' motion for

summary judgment, nor did either court examine or apply federal law enacted to control and regulate the very type of information claimed disseminated (see App. pages 131-147). Finally, neither Court considered the Shapiro order or the fact that Appellees lied to the federal bench when Appellant attempt to stem the flow of the damaging information to his reputation and livelihood. Thus, this Court should grant this Writ under its supervisory powers.

This Court should grant Appellant's Writ because of the important privacy issue, and because there exists federal statutory law which was enacted by Congress, as well as regulations created and adopted by the Department of Justice, to control the collection, storage and dissemination of this federal information and to insure a citizen's privacy interest in that information. (see Appendix pages 78-88, 106-124) This court should also grant this Writ because the decisions of the courts below simply erode the

the remedial purposes of Section 1983 as well as a citizen's privacy interest in keeping sealed federal YCA information from being disseminated in violation of federal law and court orders. As such, this court should grant this Writ on the issue of deprivation of privacy interest by a state when it collects and disseminates sealed federal information via color of state authority, when the information is regulated under federal law and regulations.

Deeply involved in this case, and such this Court's analysis of whether to grant this Writ, is the issue of what protection will be afforded under the First Amendment's freedom of speech clause, to a police officer who reports perceived police and prosecutor corruption on the part of his supervisor and the local District Attorney to the proper state and federal law enforcement agencies. In Woolley v. Maynard, 403 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977) this Court established that all citizens enjoy the right

to speak and not speak. And, given speech is such a protected fundamental right; "although not an absolute right." See, Cohen v. California, 403 U.S. 91 S. Ct. 15, 29 L. Ed. 2d 284 (1971). Any governmental retaliation, whether by law, ordinance or use of investigative grand jury, which interferes with this right, should bear the closest Constitutional scrutiny; and, it will be the governments burden to show a compelling reason for interfering with the right. see Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

The issues here is whether Appellant made out a Section 1983 action for a First and Fourth Amendment deprivation and provided sufficient evidence to survive the defendants' summary judgment motions. The facts were (1) that within hours after Appellant disclosed to Appellee Wrightstown that he was to provide to, inter alia, the U.S. Attorney's Office and F.B.I. information concerning corrupt conduct in Wrightstown's police department, which was

alleged to have been committed by Appellee Hughes, and Appellee Wrightstown informing Appellee Hughes, Appellee Hughes commenced a baseless criminal investigation against the Appellant. Further, that Appellee Hughes used this baseless investigation as authority to force Appellant to submit to finger printing, to conduct a non-consentual background check to collect federally acquired information on Appellant, and to release such information and have a County Investigative Grand Jury convened to examine the baseless allegations of Appellee Hughes. Furthermore, this County Investigative Grand Jury (which was convened by Appellees Rubenstein, Reichely, Brosha and Armitage) used its subpoena powers, and other improper threatening and intimidating methods to seize sealed federal information, compel testimony from others, and to seize Appellant's personnel files from previous and present employers, so as to avoid the Fourth Amendment judicial scrutiny and probable cause requirements. And; (2) With regards to the

Yardley Appellees, that Appellant as a police officer stopped and detained Appellee Taylor, upon reasonable suspicion of speeding and driving under the influence of alcohol. That Appellee Taylor admitted to speeding, and drinking, that a breath test confirmed alcohol, and that controlled substances were discovered in Appellee Taylor's car and purse by back up officers. That Appellant reported the detention of Appellee Taylor (then President of Yardley Borough Council) to his supervisors, per standard operating procedures, that Appellant's supervisors, which included Appellee Robinson, ordered the arrest of Appellee Taylor, but only after they investigated Appellant's stop and detention, and after consultation with Appellee Bucks County District Attorney's Office. That, after the arrest and never prior to such, Appellee Taylor reported that the arrest was a "set up.". More so, Appellee Taylor made such report to the press and Appellee Yardley Borough Council, not to any law enforcement

agency. But, that Appellee Taylor does not accused Appellant of setting her up, only that the arrest was a police set up. Despite Appellee Robinson investigating and ordering the arrest, Appellee Robinson suspended Appellant without pay, and Appellee Yardley Borough refuses to provide Appellant with any hearing on the suspension. Thus, Appellant remains suspended without pay to date.

In Shoemaker v. Allender, 520 F. Supp 266, (1981) the Eastern District held that (1) allegations that police officer was dismissed from police department for disclosing to a federal investigatory agency information ... relating to corruption in police department [and] (2) allegations by police officer that city, chief of police, and mayor conspired to prevent him from pursuing channels in seeking relief from his suspension created a material issue precluding entry of summary judgment." The Shoemaker decision also found that the police officers statements to the federal agencies was protected under the

First Amendment. Id, at 269., and has plead a "deprivation of a constitutional right". Id, at 270, citing, Baker v. McCollan, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979).

These being the facts and law, and aside from the issue of what chilling effect such state conduct can and does have on the exercise of free speech, given Appellant's facts, evidence, and the standard the evidence was to be reviewed under in a summary judgment motion, it is inescapable that the District Court improperly granted summary judgment on the First Amendment and Due Process issues (either under a liberty or property analysis). Therefore, this Court should grant this Writ.

This Court should also grant the Writ because the Appeals Court refused to address these issues, and did so for a reason which simply is not supported by an appellate procedural rule or under any judicially equitable reason. Although true, Appellant utilized incorporation as a means to get the issues before that Court he did so only to

save money and time which is seemingly what the Civil Justice Expense and Delay Act seeks to do. Thus, for the Third Circuit to refuse to address these issues because of an un-cited Rule violation; yet, while choosing to examine one issue in the incorporated brief, seems wholly wrong. Thus, this Court should grant this Writ pursuant to its supervisory powers.

This Court should also grant this Writ simply because the District and Appeals Court decisions will have a pronounced chilling effect on privacy and speech, for if the decisions of the courts below are allowed to remain, they will send the wrong message to all citizens who may be considering coming forward and speaking out on corruption in government. The decisions of the courts below will clearly cause all citizens to re-think whether it is safe to speak out against government. After all, if the court will not afford constitutional protection to a police officer when he or she comes forward and speaks out against government, than what

protection will the Court afford the ordinary citizen. Therefore, this Court should grant the Speech and Privacy issues raised in this Writ.

The District Court agreed that a Section 1983 action could be maintained for a malicious prosecution and/or abuse use of process claim could under the Losch v Borough of Parksburg, 375 F.2d 903 (1984) and Jenning v Shuman, 567 F.2d 1213 (1977) cases, but maintained that since no process was shown, i.e. arrest or complaint filed, no Section 1983 could be maintained under these facts. Thus, the District Court granted summary judgment for the Appellees. However, no answer was provided by either the District Court or the Third Circuit as to whether the initiation of a investigatory grand jury and issuance of subpoenas, used to circumvent the requirements of the Fourth Amendment, constitutes "process" so as to establish the process provision in order to make out an abuse of process and/or malicious prosecution, and Section 1983

action. The facts being as they are, and the purpose of Section 1983 being as it is (e.g. to remedy constitutional deprivations under color of state law) it would seem only proper for the court to find that serving subpoenas (under the authority of an investigative grand jury) which compel a citizen to bring and turn over to the state his property, and which allows government to detain that property for over thirteen months, while also compelling citizens to appear before the grand jury, that the subpoena issuance would constitute process for at least the purpose of a section 1983 action. Thus, for the continued preservation of our Republican form of government, confidence in the judiciary, and value we hold in our Constitution, this court should grant this Writ to decide this important issue.

Next, this Court should grant this Writ because it involves an important issue concerning the preservation of confidence citizens must have in our judiciary. Congress enacting 28 U.S.C. 455(a) to aid our society

into having confidence in the judiciary. Liljeberg v. Health Services Acquisition Corp. 108 S. Ct. 2194, 486 U.S. 847, 100 L. Ed. 2d 855 (1988) This statute was created not only to provide to citizens confidence in our judiciary, but to address concerns Congress had if society lost confidence in an independent and impartial judiciary. This Court in Liljeberg Supra, cited, "the goal of section 455(a) is to avoid even the appearance of partiality" and "requires [a] judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned". In the instant matter the impartiality of Judge Anita Brody has come to light, and by any standard, she should have recused herself once Appellee Rubenstein disclosed his relationship with her. After all, she was not long with the case, but had just recently received the case from the Honorable Eduardo Robreno, of the same bench, who had recused himself after the case was transferred to him. Judge Robreno, recognizing

the need to preserve confidence in the bench, perhaps overly so, recused himself because it was learned that he had some limited contact with a lawyer who was not presently involved in the instant case but who had represented the co-plaintiff during the pleading stages.

Judge Brody created no record; although, the statute requires such. And, because no public hearing was held or a record created, setting forth her reasons for not recusing herself, Judge Brody left all wondering what the exact relationship was and is between she and Appellee Rubenstein. Thus, Judge Brody has caused confidence in our judiciary to be eroded, and has reinforced the notion which Congress sought to avoid; that being, in our Court system it is not what you know but who you know. For this reason, this Court should grant the Writ under its supervisory powers to decide whether Judge Brody should have recused herself.

This Court should grant the Writ, because the District Court refused to hear the found

state causes of action, and dismissed the complaint when there was complete diversity between Appellant and Appellees and a good faith belief that damages exceeded Fifty Thousand ($50,000.00) Dollars. Raised as authority to hear this case, besides federal Question jurisdiction, was 28 U.S.C. 1332, Diversity of Citizenship jurisdiction (Appendix page 126-7). The District Court found that there were state cause of actions, but for unexplained reasons, or authority, the District Court elected, and the Appeals Court affirmed, to require Plaintiff to commence the actions in state court.

The purpose of diversity jurisdiction is to remove the unfair advantage government has in its own Courts. Pease v. Peck, 59 U.S. 595, 1855. Congress was well aware of this advantage when it conferred upon Federal courts jurisdiction to hear state court causes of action in the face of complete diversity. Here there can be no question whether it was improper for a Federal Court to refuse to do

its job and hear the state causes of action, for there is no applicable authority which permits a Federal Court to refuse to hear state causes of action when the statutory provision is met. As such, it was improper for the Third Circuit to affirm, and the District Court to dismiss the state causes. Therefore, this Court should grant the Writ under its supervisory powers, and order the complaint reinstated, remanded and District held.

Lastly, this Court should grant this Writ to determine whether due process was denied Plaintiff pursuant to Pennsylvania statute 53 Purdon, section 811 and other state statutes which provide the Appellant with a protectable property interest in his employment. Pennsylvania requires due process to be provided to such extent that, statutorily Pennsylvania has declared that should any local or state agency not provide due process, then as a matter of law the action taken is deemed "invalid". (See appendix pages 127, et

seq.). The District Court refused to consider this issue claiming that Plaintiff failed to provide any evidence of the size of the police force in question. However, Plaintiff's affidavit and the affidavit executed by Sergeant James O'Neill, of the Yardley Police Department, which Judge Brody used in other parts of her decision, firmly established that, *inter alia*, that at the time of Plaintiff's hiring there were only two full time members of the Yardley Police Department. Thus, Appellant under Pennsylvania law was protected from suspension, reduction or termination, and Appellee Yardley were imposed with the statutory and constitutional requirement to provided a hearing on the above referenced suspension. And, this evidence, had the court viewed it in the light most favorable to Plaintiff, should have been sufficient to survive a summary judgment motion. Thus, for these reasons this Court should grant the Appellant's Writ.

Further, as to Appellee Wrightstown, the District Court did not address Appellant's property interest with respect to his employment at Wrightstown. However, the evidence presented, which primarily was the Findings and Conclusion of the reviewing agency (Appendix 89-105) clearly established Appellant had a statutory right to notice and meaningful hearing on the record. Thus, Appellant had a constitutionally protected property interest in his Wrightstown employment. As such, it was clear error for the District Court to find (contrary to an Agency finding) that Appellant had no property interest in his employment with Wrightstown. And for this reason, this Court should grant this Writ to address the Due Process issues as they relate to the Agency findings, the Pennsylvania's Police Tenure Act, and not the Borough Code[1].

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1. The Borough Code 53 Purdon, section 46171, states that the Borough Code does not apply to a force having less than three members.

In conclusion, for the above stated reasons this Court should grant the Writ of Certiorari, on all issues, and order briefs on the merits.

Respectfully submitted,

Theodore M. Kravitz, Esquire
Attorney For Appellant
Brian M. Puricelli

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE THIRD COURT

NO. 93-1897

BRIAN PURICELLI

v.

BOROUGH OF MORRISVILLE; HARRY MERKER, CHIEF OF POLICE, MORRISVILLE BOROUGH; TOWNSHIP OF WRIGHTSTOWN TOWNSHIP; WALTER HUGHES JR., CHIEF OF POLICE WRIGHTSTOWN TOWNSHIP POLICE DEPARTMENT; ALAN M. RUBENSTEIN, DISTRICT ATTORNEY OF BUCKS COUNTY; OFFICE OF THE DISTRICT ATTORNEY OF BUCKS COUNTY; DALE REICHLEY, ASSISTANT DISTRICT ATTORNEY; EDWARD BROSHA; DAVID ARMITAGE, All individually and in their official capacity; YARDLEY BOROUGH; SUSAN TAYLOR; EDWARD ROBINSON, MAYOR, KEN CRONLUND; GEORGE DONATE

Brian M. Puricelli, Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civ. No 89-cv-09161)
District Judge: Honorable Anita B. Brody

Submitted Under 3rd Circuit LAR 34.1(a)
April 11, 1994

Before: BECKER, MANSMANN and SCIRICA, Circuit Judges

MEMORANDUM OPINION

BECKER, Circuit Judge.

Brian Puricelli, who at various times relevant to this case was employed as a police officer in Morrisville, Wrightstown and Yardley Borough, and who is now a lawyer, has appealed from an order of the district court granting summary judgment on all issues for all defendants in a civil rights action, 42, U.S.C. 1983, in which Puricelli charged personnel of the police departments and various other governmental units in Bucks County (PA) with violation of his constitutional rights. Puricelli purports to raise eleven issues before this court, but issues numbered 1-8 which he does not include in his present brief, are not properly before us. He attempts to incorporate these issues, which he raised in an earlier appeal which was dismissed for lack of jurisdiction in August 1993, merely by reference. This stratagem, however, is in violation of the federal Rules of Appellant Procedure and our local Rules. It would also permit Puricelli to circumvent the rules so as to submit a seventy page brief

where only a fifty page brief is allowed. **Fed R. App. P.** 28(g). We therefore do not reach these issues[1].

Puricelli does argue three issues (numbered 9 to 11) though he omits the state of fact, which the briefing rules require. But even supplying the facts, Puricelli's brief is difficult to follow, and is both rambling and laden with irrelevant case citations. At all events, none of these three issues has merit either. Puricelli's attempts to establish violation of a protected liberty interest founders because he did not satisfy the "reputation plus" requirements of Paul v Davis, 424 U.S. 693, 96 S.Ct 1155 (1976). Puricelli's attempts to make out a Fourteenth Amendment Due Process Claim fail because he was a part-time officer who had no protectable property interest in his employment. Finally, Puricelli's claim that defendants improperly disclosed information about his criminal record, which he views as having been in violation of a 1983 federal court order,

cannot succeed because the order did not bind any of the defendants in this case[2].

The judgment of the district Court will be affirmed.

To the clerk:

Please file the foregoing opinion.

BY THE COURT:

|S|

DATED: APR 26 1994

1. We do however comment upon the recusal issue, in which Puricelli attacks the propriety of the district court's sitting on the case. Suffice it to say that we find Puricelli's claim that Judge Brody should have recused to be plainly without merit.
2. Moreover, the elements of issue and claim preclusion invoked by Puricelli are not made out.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE THIRD COURT

NO. 93-1897

BRIAN PURICELLI

v.

BOROUGH OF MORRISVILLE; HARRY MERKER, CHIEF OF POLICE, MORRISVILLE BOROUGH; TOWNSHIP OF WRIGHTSTOWN TOWNSHIP; WALTER HUGHES JR., CHIEF OF POLICE WRIGHTSTOWN TOWNSHIP POLICE DEPARTMENT; ALAN M. RUBENSTEIN, DISTRICT ATTORNEY OF BUCKS COUNTY; OFFICE OF THE DISTRICT ATTORNEY OF BUCKS COUNTY; DALE REICHLEY, ASSISTANT DISTRICT ATTORNEY; EDWARD BROSHA; DAVID ARMITAGE, All individually and in their official capacity; YARDLEY BOROUGH; SUSAN TAYLOR; EDWARD ROBINSON, MAYOR, KEN CRONLUND; GEORGE DONATE

Brian M. Puricelli, Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civ. No 89-cv-09161)
District Judge: Honorable Anita B. Brody

Submitted Under 3rd Circuit LAR 34.1(a)
April 11, 1994

Before: BECKER, MANSMANN and SCIRICA, Circuit Judges

JUDGMENT

This case came on to be heard on the record from the United States District Court

for the Eastern District of Pennsylvania and was on April 11, 1994. On consideration whereof, it is now here

ORDERED AND ADJUDGED by this court that the judgment of the district court entered April 20, 1993 be and the same is hereby affirmed. Costs taxed against the appellant.

ATTESTED:

|s|
Clerk

DATE: April 26, 1994

Costs taxed in favor of Bor of Morrisville & Chief Merker:
Brief $115.00
Appendix $398.00
TOTAL $513.50

Costs taxed in favor of Walter J. Hughes:
Brief $95.00

Costs taxed in favor of Wrightstown Twp, George Donate, et al.:
Brief $84.89

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN M. PURICELLI : CIVIL ACTION

v. :

BOROUGH OF MORRISVILLE : NO. 89-9161

Anita B. Brody, J. September 7, 1993

ORDER

1. On April 19, 1993, [1] I granted summary judgment in defendants' favor on all of Puricelli's claims brought pursuant to 42 U.S.C. 1983 except for his procedural due process claim which I stayed for ninety days so that he would have the opportunity to exhaust his procedural remedies as set forth in the Police Tenure Act, 53 P.S. 833 and the Borough Code, 53 P.S. 46171 - 46195.

2. Puricelli now asks me to reconsider my grant of summary judgment because: (a) there was evidence in the record that he suffered a tangible loss along with an injury to his reputation; and (b) he has a federally protected privacy interest in keeping information about his prior criminal record

confidential. Puricelli also askes me to rule on his procedural due process claims because he has either exhausted his state remedies or shown that would be fruitless to pursue.

3. I will deny Puricelli's request for reconsideration of my grant of summary judgment in defendants' favor on his reputation and privacy claims because his motion was untimely and because there is no clear error of law and because there was no clear error of law and no manifest injustice resulting from my original ruling on these issues. As for Puricelli's request that I reconsider my placement of his procedural due process claims in civil suspension, I will grant this request and address below whether Puricelli had any constitutionally protected interests. Furthermore, I will grant summary judgment in defendants' favor on Puricelli's procedural

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1. While my order was dated on April 16, 1993, it was not officially filed and entered on the docket by the Clerk's Office until April 19, 1993.

due process claims and dismiss the entire complaint.

4. A motion for reconsideration exists to "correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3rd Cir. 1985), Cert. denied 106 S.Ct. 2895 (1986). Puricelli's motion for reconsideration does not suggest that there has been a change in the controlling law or that there is any newly discovered evidence. Therefore, the only ground upon which he might succeed is that I must correct a clear error of law or other manifest injustice resulting from my earlier order granting defendants' motion for summary judgment.

5. Puricelli brought his motion for reconsideration pursuant to Local Rule 20(g), and I presume, Federal Rule of Civil Procedure 59(e). Stepanuk v. State Farm Mut. Auto. Ins. Co., 1993 WL 166748 (E.D. Pa. 1993). (When a motion questions the correctness of a district court judgment then it falls within the ambit

of Rule 59(e).) Both the local and federal rules require that such a motion "be served" not later than within ten days after the judgment has been entered. Puricelli's motion is not timely because it was not served within ten days of entry of judgment. This is reason alone for dismissal of Puricelli's motion.

6. As for Puricelli's procedural due process claims which I placed in civil suspension, Puricelli must have a constitutionally protected property interest in order to be entitled to procedural due process. Whether he has a constitutionally protected property interest is determined by Pennsylvania law. Cleveland Bd. of Ed. v. Loudermill, 105 S.Ct. 1487 (1985). There are two state statutes which could apply in this case: the Pennsylvania Borough Code, 53 P.S. 46171-46195 and the Police Tenure Act, 53 P.S. 811-815. See Albrechta v. Borough of White Haven, 810 F.Supp 139, 142 (M.D. Pa. 1992).

7. Wrightstown: In his motion, Puricelli takes the position that his claim against

Wrightstown is not ripe for my adjudication. Therefore, I will grant summary judgment in Wrightstown's favor on Puricelli's procedural due process claim.

8. Yardley: In 1987, Puricelli began working as a part-time officer for the Borough of Yardley until July 1989 when he was suspended (Puricelli Depo. of 7/2/94 at page 82.) He worked for Yardley because of a complaint filed against him by Susan Taylor, a defendant in this case and then a member of the Yardley Borough Council. Following his suspension, Puricelli sent a letter requesting a grievance hearing to Sergeant O'Neill of the Yardley Police force. (See Puricelli's letter of 7/14/89.) Yardley responded to Puricelli's letter by informing him as a part time officer he was not covered by the Borough Code and denying his request for a hearing. (See Laurence Tomar's letter of 8/2/89).

Yardley decided that Puricelli did not have a constitutionally protected interest in his employment because of his part time status

and thus did not qualify for any process such as a grievance hearing. Puricelli failed to challenge this ruling within the state system by appealing to the court of common pleas under either the Police tenure Act, 53 P.S. 815 ("The suspended or dismissed employee shall have the right to appeal to the court of common pleas of the county in which he was employed.") or Borough Code, 53 P.S. 46191 ("All parties concern shall have immediate right of appeal to the court of common pleas of the county ... ."). It is possible that the Police Tenure Act and the Borough Code may grant Puricelli a property interest in his employment with Yardley, yet, I have not been presented with any evidence or argument by Puricelli on which to make such a determination and to support a finding that these Acts apply to this case and afford him a constitutionally protected interest in his employment with Yardley. See McDonald v. McCarthy, 1990 WL 131393 (E.D. Pa. 1990), aff'd 932 F.2d 960 (3rd Cir. 1991); see also

Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552-53 (1986) ("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case ...". The nonmoving party must go beyond the pleadings in order to show there is a genuine issue of material fact). For example I need to know the size of the police department. (This subdivision (j) of this article shall not apply to any borough having a police force less than three members or to those having three or more members if those members in excess of two are appointed on a temporary basis through a federally funded program... ." 53 P.S. 46171.). Since Puricelli has not presented me with facts or evidence concerning the applicability of these acts, I am unable to review Yardley's decision and I will grant summary judgment in Yardley's favor on Puricelli's procedural due process claim.

9. Morrisville: In 1988, Puricelli applied for a police officer position with Morrisville. Puricelli took a civil service examination and submitted to oral and psychological examinations. (Puricelli depo. of 7/2/91 at 55-6). Although Puricelli received the top score on the civil service examination, he did not pass the psychological examination. (Puricelli depo. of 7/2/93 at 72; Puricelli depo. of 10/22/91 at 193). As a result, Morrisville did not appoint Puricelli to a police officer position. (Puricelli Depo of 7/2/93 at 72.) Puricelli maintains that his failure of the psychological examination was not the reason Morrisville did not hire him and that the true reason was that defendant Harry Merker told the civil service commission not to hire him.[2]

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2. In his complaint, Puricelli alleges that Morrisville and defendant Harry Merker violated his procedual due process rights when they did not provide him with notice and meaningful hearing before terminating him in 1984 or before disclosing information about his arrest record. (See Puricelli's complaint at 38(b).) In his motion for reconsideration,

An applicant's name is not officially on the eligibility list for employment until the commissioners have had their chance to object. Appeal of Carlson, 618 A.2d 1206, 1209 (Pa. Cmwlth. 1992). An individual has a protectible property interest in having his or her name remain on an eligibility list but not in having his or her name placed on the list. Stana v. School District of City of Pittsburgh, 775 F.2d 122, (3rd Cir. 1985) ("The fact the Stana was on the list for so long before being removed is a significantly

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however, Puricelli maintains only that Morriville deprived him of procedural due process when it not provide him with notice of or a reason for not certifying his name to the eligibility list in 1988 when it did not provide him with a copy of the evidence upon which the Civil Service Commission based its decision not to certify his name to the eligibility list and that he exhuasted his remedies when he asked for a hearing before the Civil Service Commission. (see plaintiff's motion for reconsideration at 32-33.) The issues which Plaintiff addresses in his motion for reconsideration were not clearly, if at all, addressed in his complaint, which he amended four times. However, even if I could somehow infer these issues raised in the motion for reconsideration from his complaint, for the reason set forth below I would still have to grant summary judgment in

distinguishable fact in the creation of a property interest in that she may have foregone other opportunities in anticipation of obtaining a position with the Pittsburg school district." Carlson 618 A.2d at 1209.)

Puricelli's name never made it onto the eligibility list. Therefore, he lacks a constitutionally protected property interest in having his name placed onto the eligibility list and has no corresponding procedural due process right to a hearing prior to not having his name placed on the list. I will grant summary judgment in Morrisville's favor on Puricelli's procedural due process claim.

AND NOW, this 3rd day of September, after considering Puricelli's motion for reconsideration and the defendant's responses, it is ordered as follows:

a. Puricelli's motion for reconsideration of my summary judgment ruling in defendants'

Morrisville's favor because Puricelli does not have a constitutionally protectable interest in having his name certified to the eligibility list,

favor and against plaintiff on his reputation claim is denied.

b. Puricelli's motion for reconsideration of my summary judgment ruling in defendants' favor and against plaintiff on his privacy claim is denied.

c. Puricelli's motion for reconsideration of my summary judgment ruling to place his procedural due process claims in civil suspension is granted.

d. On Puricelli's procedural due process claims against: (i) Morrisville that were placed in civil suspension the motion for summary judgment is granted and judgment entered in the favor of the defendants and against plaintiff; (ii) Yardley that were placed in civil suspension the motion for summary judgment is granted and judgment entered in the favor of the defendants and against plaintiff; and (iii) Wrightstown that were placed in civil suspension the motion for summary judgment is granted and judgment

entered in the favor of the defendants and against plaintiff.

|S|

ANITA B. BRODY, J

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN M. PURICELLI : CIVIL ACTION

v. :

BOROUGH OF MORRISVILLE : NO. 89-9161

Anita B. Brody, J. September 7, 1993

MEMORANDUM AND ORDER

Currently pending before me is plaintiff's letter asking me to recuse or disqualify myself pursuant to 28 U.S.C. 455, to issue a decision on the outstanding procedural due process claims and to rescind or revoke my order of April 16, 1993 which granted summary judgment in defendants' favor on all of plaintiff's 42 U.S.C. 1983 claims save those alleging procedural due process violations. The issues presented by this letter are: (1) whether plaintiff's letter adequately comports with the requirements of Fed. R.Civ. P. 7;

(2) whether plaintiff's request for my disqualification is timely; and (3) whether a reasonable person with knowledge of all the

circumstances in this case would harbor doubts about my impartiality. As set forth below, I find that: (1) The informal nature of plaintiff's letter does not warrant my denial of his request solely on this ground; (2) that the request is not timely; and (3) that a reasonable person with knowledge of the circumstances of this case would not doubt my ability to be impartial.

On July 19, 1993, plaintiff, Brian Puricelli ("Puricelli") filed a letter with the Clerk's Office. Mr. Puricelli asked me to "accept this letter in lieu of more formal request to disqualify and for decision on pending motions for reconsideration." In order to consider the merits of plaintiff's requests, I must refer back to a status conference I had with all counsel.

On February 9, 1993, after this case was transferred to me, I held a status conference in chambers with all counsel present. As reflected on the counsel sign in sheet, counsel for Mr. Puricelli, William Bowe,

Esquire, was present at this meeting as was counsel for Donald Garner, plaintiff in a related matter[1] , William M. Benjamin, Esquire and Patricia V. Pierce, Esquire. During this status conference I discused with counsel a letter I had received from counsel for defendant Alan Rubenstein.[2] This letter stated that Mr. Rubenstein campaigned with me and attended several fund raising events on my behalf when, four years ago, I ran for a position on the Pennsylvania Supreme Court. The letter also pointed out that when I was a judge on the Court of Common Pleas for Montgomery County, Mr. Rubenstein gave me a tour of the Bucks County criminal justice facilities and briefed me on Bucks County's handling of criminal cases.

At no time during this conference nor at any time prior to Mr. Puricelli's letter of July 19, 1993 did any party or counsel for any party object to my continued handling of this case. On April 16, 1993, I granted defendants' motions for summary judgment on

all pf plaintiff's 42 U.S.C. 1983 claims except for those alleging violations of his procedural due process rights.

Defendants object to Mr. Puricelli's filing of a letter in place of a formal 2. Copies of this letter went to all counsel. motion, to the timeliness of his request and to the actual content of that request.

a. Formality:

Rule 7(b) of the Federal Rules of Civil Procedure provides that "[a]n application to the court for an order shall be by motion which...shall state with particularity the grounds therefor, and shall set forth the relief or order sought...The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules." Rule 10(a) of the Federal Rules of Civil Procedure sets forth the necessary form of pleadings and requires that every pleading include a caption

1. Garner v. Township of Wrightstown et al., civil Action No. 90-1228.

with the name of the court, title of the action and file number. Clearly, plaintiff's letter to the court does not comply with these pleading rules. Despite plaintiff's failure to abide by proper pleading form, in light of the Third Circuit's ruling in Smith v. Danyo, 585 F.2d 83,86 (3rd Cir. 1978), I will not deny plaintiff's letter seeking my disqualification simply because of its informality.[3]

B. Timeliness

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3. In Danyo, the District Court denied the plaintiffs' request for recusal filed pursuant to 28 U.S.C. 144 because their request did not comply with the formal motion and briefing procedure set forth in the Federal Rules of Civil Procedure and in the pretrial order issued in the case. The Third Circuit overruled the District Court's denial because 28 U.S.C. 144 itself only requires the submission of an affidavit and certificate by counsel that it is filed in good faith and because recusal is entirely collateral to the progress of the lawsuit." Id. at 86. In addition, the Third Circuit noted that even if it was to require recusal motions to meet the standards set forth in the Federal Rules of Civil Procedure the affidavit submitted by the plaintiffs sufficed as the Rule 7(b) requirements exist "simply 'to give a simple and elastic procedure without too must emphasis on form."" Id. at 86; quoting Raughley v. Pennsylvania Railroad Co., 230 F.2d 387, 391 (3rd Cir. 1956).

28 U.S.C. 455 provides, in part, that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. He shall also disqualify himself...[w]here he has a personal bias or prejudice concerning a party... ." Implicit in this statute is a requirement that any motion filed pursuant to it be done so in a timely manner. Schwartz v. Hospital of Unniversity of Pennsylvania, 1992 WL 102864 *2 (E.D.pa. 1992). This means that when a party seeking recusal learns or knows of facts on which he relies or his motion then he must "make a timely motion to disqualify or lose his right to do so." Planned Parenthood of Southeastern Pennsylvania v. Casey, 812 F.Supp. 541, 546 (E.D.Pa. 1993); Schwartz, 1992 WL 102864 *2.

The Third Circuit, in Smith v. Danyo, 585 F.2d 83, 86 (3d {sic} Cir. 1978) noted that "[t]he judicial process can hardly tolerate the practice of a litigate with knowledge of

circumstances suggesting possible bias and prejudice holding back, while calling upon the court for hopefully favorable rulings, and then seeking recusal when they are not forthcoming."[4] Thus, when a party knows of circumstances which it believes warrant a judge's disqualification and does not bring these concerns to the judge's attention in the hope that the judge will rule in his or her favor on outstanding matters and then seek disqualification after the rulings are not in his or her favor, that motion would be deemed untimely. Schwartz, 1992 WL 102864 *2.

4. It should be noted that in Danyo, a case involving recusal under 28 U.S.C. 144, the party seeking recusal filed its motion three months after the events which gave rise to the allegations of bias occurred. The Third Circuit did not find this to be an untimely motion because neither party called upon the court for any rulings during that three month interim, period.

It must also be noted that the Eastern District of Pennsylvania relies on the Third Circuit's discussion of timeliness in Danyo and applies it to recusal motions brought pursuant to 28 U.S.C. 455. See Schwartz, 1992 WL 102864 (E.D.Pa. 1992).

At the time I held the status conference, defendants' motions for summary judgment had not yet been ruled upon. In fact, my rulings on these motions were not filed until more than two months after this status conference. At no time during or after the conference did Mr. Puricelli or his attorney, or any attorney or party in this case suggest or seek my disqualification. In fact, at the conference, all counsel agreed that my limited interaction with Mr. Rubenstein during my bid for a seat on the Pennsylvania State Supreme Court was of no consequence in this case and would not affect by {sic} ability to be impartial. Now, after rulings against his favor on defendants' motions for summary judgment, Puricelli seeks my disqualification. In light of the Danyo and Schwartz decisions, I find that Puricelli's letter seeking my disqualification is untimely and should be denied. Schwartz, 1992 WL 102864 *3.

C. Impartiality:

I address the merits of plaintiff's request for my disqualification, if only to illustrate that, regardless of the timeliness of his motion, plaintiff has not alleged any reason for my recusal. Schwartz, 1992 WL 102864 *3. The recusal statute, 28 U.S.C. 455, exists to "promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case." United States v. Agnes, 1992 WL 122855 *3 (E.D.Pa. 1992), aff'd 986 F.2d 1410 (3rd Cir. 1993), cert. denied ___S.Ct.___, 1993 WL 113073 (1993); United States v. Nobel, 696 F.2d 231 (3rd Cir. 1982), cert. denied 462 U.S. 1118 (1993), quoting House Report at 5, reprinted in 1974 U.S. Code Cong. & Admin. News at 6354-55. The standard for determining whether a judge should be disqualified under 28 U.S.C. 455 is whether a "'reasonable

[person] knowing all the circumstances would harbor doubts concerning the judge's impartiality.'" Winward v. Hill, 1993 WL 175418 *2 (E.D.PA. 1993); quoting United states v. Vespe, 868 F.2d 1328, 1341 (3rd Cir. 1989).

While I have the obligation to recuse myself when there is a reason to do so, I have an equal obligation not to recuse myself when there no {sic} reason to do so. Armstrong Rubber Co. v. Carr, 1986 WL 4485 *2 (E.D.Pa. 1986) The basis for plaintiff's request in that Mr. Rubenstein, a defendant, campaigned with me, attended several fund raising events on my behalf when I was running for the Pennsylvania Supreme Court four years ago and gave me a tour of the Bucks County criminal justice facilities when I was sitting on the Montgomery County Court of Common Pleas bench. A reasonable person with knowledge of these circumstances surrounding my limited interaction with Mr. Rubenstein would conclude that I am capable of being impartial towards

all the parties in this lawsuit. As Judge Speiegel of the South District of Ohio stated in a similar case:

> There were many people who supported my nomination, and while I am grateful for the confidence they have shown in me, I in no way feel that I owe them anything. They are all strangers in this courtroom. To recuse oneself bases on such a slight association would be unfair to my colleagues and to the public. It also would invite many unwarranted motions of a similar type whenever a judge assigned to a case has had some prior relationship with any of the parties before him. Warner v. Global Natural Resources PLC, 545 F. Supp. 1298, 1302 (S.D. Ohio 1982).

If I am unable to hear a case because it involves someone who attended a fund raising event on my behalf or someone with whom I had brief and limited professional encounters while sitting on the bench in Montgomery County then I would frequently have to recuse myself. I am not prepared to find that members of the public, reasonable people, believe that judges, like myself, are incapable of

maintaining their impartiality any time one of the parties to a lawsuit is an acquaintance or has some other remote connection to or with the judge.

Forth these reasons, I find that Mr. Puricelli's request for my disqualification and therefore my revocation of the April 16, 1993 order must be denied. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN M. PURICELLI : CIVIL ACTION

v. :

BOROUGH OF MORRISVILLE : NO. 89-9161

Anita B. Brody, J. August 5, 1993

ORDER

AND NOW, this 4th day of August 1993, after consideration of plaintiff's letter requesting that I disqualify myself and that I revoke or rescind my Order of April 16, 1993 and of the responses filed by defendants Alan Rubenstein, Dale Reichley, Harry Armitage, William Brosha and the Bucks County District Attorney's Office and defendant Borough of Morrisville and Harry Merker and Walter Hughes, it is rdered as follows:

1. Plaintiff's request for my disqualification is denied.

2. Plaintiff's request that I revoke my order of April 16, 1993 is denied.

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ANITA B. BRODY, , J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN M. PURICELLI : CIVIL ACTION

v. :

BOROUGH OF MORRISVILLE : NO. 89-9161

Anita B. Brody, J. April 16, 1993
ENTERED 4/20/93

MEMORANDUM

In these motions for summary judgment on plaintiff's Section 1983 claims for violations of his civil rights, I am being called upon to decide:

1. Whether, in an action sounding in defamation, the long established precedent that injury to reputation alone is not actionable as a violation of the United States Constitution is abrogated by a provision of the Pennsylvania state constitution indemnifying reputation as a constitutionally protected interest?

I find that it is not.

2. Whether there is any constitutionally protected privacy interest which defendants violated when they investigated plaintiff's

criminal background, disclosed information about plaintiff's criminal history and made statements about him to an investigatory grand jury which ultimately disbanded without charging him. I find there is not.

3. Whether the plaintiff maintained a cognizable Section 1983 "malicious prosecution/abuse of process" claim against defendants for initiating and conducting a grand jury investigation centered upon plaintiff's possible involvement in an alleged mishandling of abandoned cars when he has not identified any facts establishing any process such as arrest or the filing of criminal charges? I find there is not.

INTRODUCTION

On December 27, 1989, plaintiff, Brian Puricelli ("Puricelli") filed this lawsuit, pursuant to 42 U.S.C. 1983. [1] This court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. 1343 and 1331.

Currently pending before me are four motions for summary judgment; one filed by

each group of defendants.[2] Also pending before me are some of the defendants' motion for summary judgment filed in Garner v. Township of Wrightstown et al., Civil Action Number 90-1228. These cases were consolidated for discovery purposes by order of Judge DuBoise on August 6, 1990. Although Subsequently they involve some of the same facts and occurrences I am considering the summary judgment motions separately and issuing a separate opinion in the Garner case.

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1. Puricelli amended his original complaint several times. On May 3, 1991, Judge Van Antwerpen entered an order permitting Puricelli to amend his complaint for a forth and final time. On May 16, 1991, Puricelli filed his forth amended complaint. references to the "complaint" shall refer to the forth amended complaint unless otherwise specifically noted.

2. There are four basic groups of defendants: (1) Walter H. Hughes, Jr. ("Hughes") Chief of Police for Wrightstown Township; (2) The "Bucks County" defendants - the Bucks County District Attorney's Office, Alan Rubenstein ("Rubenstein") the District Attorney for Bucks County, Dale Reichely ("Reichely") an assistant district attorney for Bucks County, William Brosha ("Brosha") and Harry Armitage ("Armitage") detectives with the Bucks County District Attorney's Office ; (3) the Borough

The defendants move for summary judgment in accordance with Fed. R.Civ.P. 56(c) which provides that summary judgement "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I must evaluate the record in a light most favorable to Puricelli as the party opposing the motion for summary judgment. Hollinger v. Wagner Mining Equiptment Co., 667 F.2d 402, 495 (3rd Cir. 1981). The defendants are entitled to summary

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of Morrisville ("Morrisville") and Harry Merker ("Merker") the Chief of Police Morrisville; and (4) the "Wrightstown defendants" - Wrightstown township, Ken Cronlund ("Cronlund") and George Donate ("Donate") members of the Wrightstown Board of Supervisors, Yardley ("Yardley"), Susan Taylor ("Taylor") a member of the Yardley Borough Council and Edward Robinson ("Robinson") the Mayor of Yardley. The defendants originally filed motions to dismiss Puricelli's complaint. Judge Van Antwerpen denied these motions.

judgment when no reasonable resolution of the conflicting evidence and the inferences which could be drawn from that evidence could result in a judgment for Puricelli. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Bank of Am. Nat'l Trust and Sav. Ass'n v. Hotel Rittenhouse Assoc. 595 F.Supp. 800, 802 (E.D. Pa 1984).

In there motion for summary judgment, the defendants maintain that Puricelli fails to state a cause of action upon which relief can be granted because he has not alleged any claims which are cognizable under the Constitution or laws of the United States. Additionally, the defendants maintain they are immune from suit under the doctrines of absolute or qualified immunity and that any state law claims made by Puricelli are barred by the statute of limitations.

FACTS

Between 1979 and 1989, Puricelli, worked as a part time police office for Wrightstown and the Borough of Yardley and Morrisville.

Puricelli alleges causes of action arose while he was employed by these police departments.

Puricelli worked as a part time police officer for the Borough of Morrisville ("Morrisville") from 1979 to 1984 when he was discharged.[3] When he applied for employment with Morrisville, Puricelli stated on his application that e had been arrested, convicted and had served a term of probation for possessing a controlled substance.[4] Chief Merker ("Merker") of the Morrisville police force investigated and fleshed out the circumstances surrounding Puricelli's arrest.

In February, 1984, after his discharge from the Morrisville police force, Puricelli applied for and received a part time position with the Wrightstown Township ("Wrightstown")

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3. The Morrisville police force terminated Puricelli in January of 1984. (Puricelli depo. of 7/2/91 at 10.)

4. On July 19, 1976, Puricelli was arrested in Texas and charged with possession of marijuana with intent to delver. Puricelli was convicted of these charges and received two years of probation. On November 16, 1978, Judge.

police force. (Puricelli Depo. of 7/2/91 at 82-83). During his tenure with the Wrightstown police force Puricelli and Chief Walter Hughes ("Hughes") became embroiled in several disputes.[5] Despite their differences, Puricelli worked for Wrightstown until September 1988 when he moved to Michigan to begin law school.[6] The Wrightstown police force disbanded on December 31, 1988.

Hannum, of the Eastern District of Pennsylvania, entered an order discharging Puricelli from probation and setting aside his conviction pursuant to 18 U.S.C. 5021(b). On April 14, 1983, Judge Hannum denied Puricelli's request to expunge his criminal record and ordered that Puricelli's records, maintained by the Federal Bureau of Investigation, be removed from the central criminal files and placed in a separate storage facility. Pursuant to this order, these records may not be opened "unless the Federal Bureau of Investigation determines they are needed in the course of a bona fide criminal investigation ... the United states [may] not disseminate these records to anyone...for any purpose other than as set forth above." Judge Hannum further ordered the F.B.I. to delete Puricelli's criminal record from the computer and the Eastern District of Pennsylvania to seal its records pertaining to Puricelli.

During the last six months of his employment with Wrightstown , Puricelli became the subject of a criminal investigation involving an investigatory grand jury. This investigation, conducted by Dale Reichley, an assistant district attorney for Bucks County and Detectives Brosha and Armitage, also of the Bucks County District attorney's office, centered upon Puricelli's involvement in the alleged mishandling of abandoned cars in the area.[7] The investigation did not result in the filing of any charges against Puricelli or in his arrest, and the investigatory grand jury disbanded without indicting him. However, during the course of the investigation, Hughes,

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5. According to Puricelli, their troubles began when Hughes asked Puricelli to fix a ticket. Puricelli refused and reported this request to Alan Rubenstein ("Rubenstein"), the Bucks County District attorney. (Puricelli Depo. of 7/2/91 at 85-87.) Hughes then began cutting Puricelli's hours. (Id at 89-92.) Eventually, both men contacted the Bucks County District Attorney's office and other law enforcement agencies to lodge complaints about each other. These complaints resulted in an investigation of Puricelli and his involvement in an allegedly unlawful abandoned

Reichley, Brosha and Armitage interviewed law enforcement officers and other members of the community about Puricelli and discussed with them Puricelli's criminal record and his status as the subject of a grand jury investigation.[8]

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car scheme but did not result in any investigation of Chief Hughes' supposedly improper conduct.

6. Puricelli maintains that he obtained an educational leave of absence from Ken Cronlund, a member of the Wrightstown Board of Supervisors. (Puricelli Depo. of 7/2/91 at 168.) However, on November 30, 1988, Terry Clemons, solicitor for Wrightstown, sent Puricelli a letter which stated that "the Township considers your dropping off your keys at the Township Police Department in August of 1988 and not making yourself available for police duty, is an effective resignation from the Wrightstown Township Police Department."

7. In September 1987, Hughes granted Puricelli permission to establish and maintaining an abandon vehicle towing file for the Wrightstown police force. (Puricelli affidavit of 8/19/92 at 4) In February 1988, a member of the community contacted Hughes about a car that was in the possession of an auto salvage business owned by Donald Garner, plaintiff in the related case of Garner v. Township of Wrightstown et al., 90-cv-1228. Hughes knew that Garner and Puricelli were friends and that Puricelli helped Garner with the paperwork for his business. (Puricelli Depo. of 10/22/91 at 71; Report prepared by Detective Brosha.) Hughes searched the police

In 1987 Puricelli obtained part time employment with the Borough of Yardley ("Yardley") police force. (Puricelli Depo. of 7/2/91 at 182.) He worked for Yardley until July 1989 when he was

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files to determine what action the Wrightstown police force took concerning the car in issue. (Brosha Report) While searching the files, Hughes noticed Puricelli's signature on a large number of abandoned vehicle reports and that Puricelli had not included the usual paperwork as required by the Wrightstown police force's procedure for handling vehicles abandoned with its borders. (Brosha Report.)

8. During the course of his own investigation Hughes contacted James O'Neill, supervisor for the Yardley police department, Robert Cressman, a member of the Wrightstown police force and Martin Duffy, chief of police for Newtown Township. (See Affidavits of O'Neill, Cressman and Duffy.) In particular: (1) Hughes asked O'Neill if he was going to fire Puricelli because of the grand jury investigation into the abandon car scheme; (2) Hughes talked to Cressman about Puricelli's drug conviction and his involvement in the alleged abandoned car scheme; and (3) Hughes spoke with Duffy about Puricelli alleged involvement in an illegal method of disposing of abandoned cars. (O'Neill Affidavit at 19, Cressman Affidavit at 1, 9(b) and Duffy Affidavit at 2.)

During the course of the investigation conducted by the Bucks County District attorney's office, Reichely, Brosha and Armitage also met with and spoke with other

suspended because of a complaint filed against him by Susan Taylor, a defendant in this action and then a member of the Yardley Borough Council.[9]

During 1988, Puricelli again sought employment with the Morrisville police Department. (Puricelli Depo. of 7/2/91 at 55.) Although he received the top score on the civil service examination, Puricelli failed the psychological examination and consequently did not receive a position with the force. (Puricelli Depo. of 10/22/91 at 193.)[10]

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police officers and community members and told them of Puricelli's criminal record and the grand jury investigation. In particular Brosha met with O'Neill, told him that Puricelli should not be a police officer because he was a "convicted drug dealer" and asked to see Puricelli's personnel file. (O'Neill Affidavit at 6.) O'Neill refused to let him do so and Brosha returned with a subpoena compelling O'neill to appear before the grand jury with the personnel file. (Id at 10, 13.) Also, Reichley and Armitage met with Cressman and told him that Puricelli and Garner were running a chop shop and that Puricelli was a convicted drug smuggler. (Cressman Affidavit at 2(d).)

DISCUSSION

I. Section 1983

Puricelli's response to the motion for summary judgment categorizes the numerous allegations made in his complaint into five basic claims pursuant to 42 U.S.C. 1983: (1) harm to his reputation: (2) invasion of his privacy; (3) "malicious prosecution/abuse of process:" (4) deprivation of procedural due process under the Police Tenure Act and Pennsylvania Borough Code[11] and (5) conspiracy

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9. Edward Robinson, then the Mayor of Yardley and a defendant in this action, suspended Puricelli and a fellow arresting officer after they arrested and filed criminal charges against Taylor for possession of a controlled substance and driving under the influence of alcohol and a controlled substance. (Puricelli Depo. of 7/2/91 at 204; James O'Neill Affidavit at 26-27.)

10. Puricelli challenged his failure to receive this position at a hearing before the Civil Service Commission, held at his request. (Puricelli Depo. of 10/22/91 at 193, 212.) The Civil Service Commission issued a letter to Puricelli in which it stated that his name was removed from the list of eligible candidates for employment with the Morrisville police force.(Puricelli Depo. of 10/22/91 at 195.)

to deprive him of his constitutional rights and to convene a grand jury.[12]

In order to state a viable claim under 42 U.S.C. 1983 Puricelli must prove (1) "that the defendant had deprived him of a right secured by the 'Constitution and laws' of the United States"; and (2) "that the defendant deprived him of this
constitutional right' under color of any statute, ordinance, regulation, custom or usage of any State or Territory." Adickes v. S.H. Kress & Co., 398 U.S. 144, 150, 90 S.Ct 1598, 1602, 26 L.Ed.2d 142 (1970). There does not appear to be any dispute between the parties that this "under color of" prong has been met.

Rather, the issue is whether Puricelli has shown that the defendants deprived him of any right secured by the Constitution and laws of the United States. Puricelli does not dispute

11. Defendants Merker and Morrisville, in their motions for summary judgment,

that the various defendants are entitled to absolute and qualified immunity defenses.

As stated in the companion case of Garner v. Township of Wrightstown, United States District Court for the Eastern District of Pennsylvania 90-CV-1228 at 12:

> Comporting with the directive of Siegert v. Gilly, 111 S.Ct 1789 (1991), I begin my analysis by determining whether plaintiff has identified any facts on which he can assert a cognizable Section 1983 claim for relief. Although it is conceivable that these same facts might

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contend that Puricelli's due process claim based upon his termination by Morrisville in 1984 is barred by the statutes of limitations. As set forth below in this memorandum, because I am not now deciding the procedural due process claims, I will not now determine whether the statute of limitation bars this 1984 claim.

12. In his complaint, Puricelli asserts an equal protection claim against defendant Walter Hughes. Puricelli does not address or in any way substantiate this claim in his responses to Hughes' motion for summary judgment. For this reason, I assume that Puricelli chose not to pursue this claim and grant summary judgment in favor of Hughes and against Puricelli.

> give rise to one or more state law causes of action, these facts do not give rise to any claim that defendants violated any recognized constitutionally protected right. Because the federal constitution is not intended to serve as a font of tort law creating remedies for private citizens against state action in the absence of a violation of a specific constitutional safeguard, see, e.g. Paul v. Davis, 424 U.S. 693, 701 (1975), I must enter summary judgment in favor of defendants and against plaintiff on his Section 1983 claims.

This analysis compels the same result in the instant case.

a. The defendants did not injure any constitutional protected interest in plaintiff's reputation when they disclosed information about his criminal record and made statements about his involvement in activities under investigation by the county grand jury.

My first inquiry regarding Puricelli's harm to his reputation claim is whether the defendants deprived him of any rights secured by the Constitution and laws of the United States when they made false criminal accusations about him and when they disseminated information about his prior

criminal record and the grand jury investigation. In his responses to the motions for summary judgment, Puricelli states that the basis of his reputation claim is United States Supreme Court's decision in Paul v. Davis, 424 U.S. 693, 96 S.Ct 1155, 47 L.Ed2d 405 (1975)

In Paul v. Davis, the plaintiff brought an action under 42 U.S.C. 1983 after the Louisville, Kentucky police department circulated a flyer to area merchants to alert them to possible shoplifters in the area. This flyer contained the plaintiff's photograph and name. Earlier that year, the police arrested the plaintiff for shoplifting but he never was convicted. This flyer came to the attention of the plaintiff's work supervisor who issued him a warning. The plaintiff maintained that the publication of his name and face in the flyer deprived him of his liberty interest accorded under the Fourteenth Amendment because he would suffer impairment to his future employment prospects and because he feared

that other shopkeepers would think he was a shoplifter.

The Supreme Court recognized that stigma imposed upon plaintiff by his inclusion in the flyer and the defamatory nature of the publication, however, it refused to hold that an individual's reputation interest deserved procedural due process protection under the liberty or property provisions of the Due process Clause. Paul, 424 U.S. at 712. Rather, the plaintiff's reputation interest "is simply one of a number which the State may protect against injury by virtue of its tort law... ." Id at 712. "{P}etitioners' defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any 'liberty or property' interests protected by the Due Process Clause." Id.

As I stated in Garner at 12-16:

> Mr. Garner argues that reputation is a fundamental liberty interest shield by procedural due process protection -- an argument that plaintiff predicates on Paul v. Davis, Supra, which held

that the federal constitution does not extend protection to an individual's reputation alone in the absence of other "tangible" injuries or damages. 424 U.S. at 712 (reputation alone, no matter how seriously harmed, does not implicate any "liberty" or "property" interests protected by the due process clause); see also Siegert v. Gilley, supra, 111 S.Ct. at 1794.

In an attempt to differentiate the result in Paul which rejected a federal civil rights action for reputation injuries because the highest protection accorded reputation under Kentucky law was a tort action for defamation, Mr Garner seizes upon the language of Article I [section] 1 of the Pennsylvania Constitution to argue that, under Pennsylvania law, injury to reputation alone is a cognizable violation of a liberty interest secured by the federal constitution because "reputation" is a fundamental right shielded by due process protection..." under the Pennsylvania state constitution. (Plaintiff's response to Chief Hughes' motion for summary judgment at p.8.)[13] This creative argument has been considered and rejected in another decision for this district in Lee v

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13. Article I [section] 1 provides, in pertinent part, that "All men born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring possession and protecting property and reputation, and of pursuing their own happiness." (Emphasis added.) Plaintiff argues that I should allow the reputation claim to proceed even in the absence of other damages because Pennsylvania state courts have

Mihalich, 630 F.Supp. 152, 155 (E.D.PA 1986). Numerous decisions from circuit have held that a cognizable Section 1983 cause of action does not arise where a defendant has defamed the plaintiff and injured his reputation in the absence of other damages. see e.g. Kulwicki v Dawson, 969 F.2d 1454, 1468 (3rd cir. 1992); Clark v Township of Falls, 890 F.2d 611, 619-620 (3rd cir. 1989); Robb c City of Philadelphia, 733 F.2d 286, 294 Defeo v Sill, 810 F.Supp. 648, 657 (E.D.Pa 1991); Sergio v. Doe, 769 F.Supp. 164, 166 (E.D.PA 1991); cf. Sturm v. Clark, 835 F.2d 1009, 1012-13 (3rd Cir. 1987) (there is no protected interest in reputation which would be actionable only under Pennsylvania state defamation law). Just last year, in Lahaza v. Azeff, 790 F.Supp 88,93 (E.D.Pa 1992), the court rejected the plaintiff's Section 1983 claim for reputation injuries cause by public knowledge of a criminal investigation: "This theory would render virtually

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held that reputation enjoys heightened protections as a fundamental interest under the state constitution. Plaintiff relies on Hatchard v Westinghouse Broadcasting Co., 516 Pa. 184, 532 A.2d 347 (1987), which held that the Pennsylvania Shield Law was not an absolute shield protecting all of a publication's information from discovery in a defamation claim because of the heighten protections to a plaintiff's reputation, and Pennsylvania Bar Ass'n v. Commonwealth of

every criminal investigation actionable, under [section] 1983, if the public somehow became aware of it. This is clearly not what was intended by Congress in the drafting of 42 U.S.C. 1983."

My ruling today should not be interpreted that I foreclose the possibility that the reference to "reputation" in the Pennsylvania constitution could ever serve as a "liberty" interest invoking the protections of procedural due process. As noted by Gerald Gunther in his discussion of Vitek v. Jones, 445 U.S. 480 (1980)[14] in his casebook Constitutional Law (12th ed. 1991 at pp. 594-598) an "objective expectation, firmly fixed in state law and [official] practice" could give rise to a liberty interest protected by Due Process clause. Vitek and Pennsylvania Bar Ass'n v. Commonwealth of Pennsylvania, 607 A.2d 850 (Pa. Commw. 1992)[15] the Commonwealth Court decision relied upon by plaintiff, both found a protected liberty interest that precluded stigmatization by ex parte adjudications -- the very type of action which troubled the dissent in Paul v. Davis.

Pennsylvania, 607 A.2d 850, 856 (Pa. Commw. 1992), which declared a state vehicle code Amendment requiring reporting of suspected fraudulent claimants and their attorneys to be unconstitutional because, among other reasons, reputation was a fundamental right "which cannot be deprived without compliance with state constitutional standards of due process and equal protection." However, as plaintiff acknowledges by his citation to Bargerstock v WGCAC, 397 PA Super,. 403, 580 A.2d 361 (1990). appeal denied, 529 Pa. 655, 604 A.2d 247 (1992) in his brief, the Pennsylvania Superior Court reversed a state trial court's

> By contrast, Mr. Garner's claim is nothing more than a state defamation action masquerading as a Section 1983 claim. The facts, when viewed most favorable to him, are simply that untrue statements were made about him. There are no facts to establish that these untrue statements in any way effectuated an official judgment or even a change in his status. It is axiomatic that a judgment or a change of status --- the very element lacking in this case -- is necessary to invoke due process protections of notice and a hearing prior to the judgment or chage in status. In the absence of this critical element, the singular fact that these statements were made by local officials does not elevate a defamation claim to constitutional status under federal law for purposes of Section 1983 liability. moreover, in light of the Superior Court's decision in Bargerstock v WGCAC, 580 A.2d 361 (PA. Super. 1990) it is apparent that, in the absence of this element, a defamation claim is not elevated to constitutional status under state constitution for purposes of Section 1983 liability.

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failure to grant defendant's motion for judgment notwithstanding the jury verdict for plaintiff on a Section 1983 claim because the plaintiff failed to prove "reputation plus" damages required by Paul v. Davis to maintaining a Section 1983 federal civil rights claim.

In his responses to the motions for summary judgment Puricelli relies solely upon his assertion that Pennsylvania regards reputation as a fundamental interest for his argument that harm to his reputation alone is a viable claim under 1983. Puricelli does not address whether he suffered a tangible injury as articulated in the Paul decision. "Unless coupled with a tangible injury such as the loss of employment or extinction of a vested right recognized by state law, defamation by state officials is not actionable under 1983."Defeo v. Sill, 810 F.Supp. 648, 656 (E.D. Pa. 1993) citing Paul, 96 S.Ct. at 1160. Because Puricelli has not discussed whether or not he suffered any such tangible injury, I decide whether summary judgment is appropriate

14. In Vitek, the Supreme Court held that the involuntary transfer of a prisoner to a mental hospital implicated a liberty interest invoking procedural due process protections. 455 U.S. at 491-97.
15 See pages 13-14 of (the Garner memorandum) at footnote 3 (reproduction here as footnote 13).

for Puricelli's reputation claim only after examining whether reputation alone is a protected interest. Since reputation, alone does not support a finding that there is a constitutionally recognized claim for harm to reputation, summary judgment is granted in favor of all the defendants on Puricelli's harm to his reputation claim.

b. Plaintiff did not have a constitutionally protected privacy interest in information pertaining to this criminal history and to grand jury investigation.

The primary issue here is whether Puricelli has a constitutionally protected privacy interest in his criminal history and the grand jury investigation which defendants violated. Puricelli claims that the defendants' violated his right to privacy when they revealed to each other, to the grand jury and to other community members that he was the target of a grand jury investigation, claimed that he was running a "chop shop" and stated that he was a drug smuggler and had an arrest record. Additionally, Puricelli maintains that

defendants disclosed information contained in his FBI record even though Judge Hannum set aside his conviction and ordered the FBI to remove his criminal record from its criminal files and store it separately and ordered the Clerk's office to for the Eastern District of Pennsylvania to seal his record. Because there is no federal law of privacy Puricelli's invasion of privacy claim must rest, if at all, on the constitutional right to privacy. Jones/Seymour v. LeFebvre, 781 F.Supp. 355, 358 (E.D.Pa. 1991), aff'd 961 F.2d 1567 (3rd Cir. 1992).

The United States Constitution affords some level of protection to an individual's privacy. Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). Generally, the constitutional right to privacy consists of: (1) the right to be free of interference when making particular important decisions; and (2) the "interest in avoiding disclosure of personal matters." Jones/Seymour, 781 F.Supp. at 358. The Supreme Court, in the decision of

Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), held that the constitution includes and protects an individual's interest "in avoiding disclosure of personal matters" and "the interest in independence in making certain kinds of important decisions." [16] See also Fraternal Order of Police, Lodge 5 v. Philadelphia, 812 F.2d 105, 109 (3rd Cir. 1987); United States v. Westinghouse Electric Corp., 638 F.2d 570, 577 (3rd Cir. 1980) (Employee's medical records contain personal and confidential information which are deserving of privacy protection.) Here, the controversy centers upon whether Puricelli has a protectable interest in avoiding the disclosure of personal matters concerning his criminal record and grand jury investigation.

As I discussed in Garner at 17-19, which sheds light on the contentions of Puricelli:

16. The Pennsylvania Supreme Court also uses this same two - pronged approach to analyz privacy cases which arise under the state's constitution. F.O.P., 812 F.2d at 110.

Although Mr. Garner contends that it was a constitutional invasion of his privacy for the defendants to reveal that he was implicated in the investigation, he fails to address the parameters of the constitutionally protected privacy interest and relies, instead, on the elements of a Pennsylvania tort for invasion of privacy. (See responses to the Bucks County defendants' motion for summary judgment at pp. 8-10 and to the Wrightstown defendants' motion for summary judgment at pp. 5-7.) In Whalen v. Roe, 429 U.S. 589, 599-600 (1977), the United States Supreme Court recognized a constitutionally protected privacy interest in the right to be free from interference in making certain kinds of important personal decisions (the autonomy branch). The Whalen Court also recognized a constitutionally protected privacy interest in the right against disclosure of personal matters (the confidentiality branch).

Because Mr. Garner asserts his claim under the confidentiality branch, my first inquiry is whether the type of information disclosed -- the fact that Mr. Garner's business operations were implicated in a police and grand jury investigation -- is the type of "private" information protected by the constitution. See Scheetz v. The Morning Call, Inc., 946 F.2d 202, 202 n.5 (3rd Cir. 1991), cert denied, 112 S.Ct 1171 (1992). I find that it is not.

The fact that an individual is the subject of a police or grand jury investigation is, by its nature, the type of public information in which a plaintiff does not have a federally protected privacy interest. See, e.g., Paul v. Davis, supra (publication of arrest does not implicate constitutional privacy right); Scheetz v. The Morning Call, Inc., supra, (information in police reports is not protected by constitutional right to privacy); Trade Waste Management Ass'n Inc. v. Hughey, 780 F.2d 105

(3rd Cir. 1987) (disclosure of criminal convictions and pending criminal charges not protected and any expectation of privacy in the conduct underlying the charges has never been "reenforced" by law). Compare Fraternal Order of Police, Lodge 5 v. Philadelphia, 812 F.2d 105, 109 (3rd Cir. 1987) (there is no absolute protection against disclosure of constitutionally protected medical information if government's interest in disclosure outweighs individual's privacy interest); United States v. Westinghouse., 638 F.2d 570 (3rd Cir. 1980) (same).

Here, regardless of whether the investigation was properly initiated, it was initiated and thus, any disclosures fell within the ambit of public information in which Mr. Garner did not have a constitutional privacy interest. Indeed, in his briefs, Mr. Garner relies on state tort law as a basis of his claim. Whether or not plaintiff could succeed on a state cause of action for invasions of privacy is irrelevant to this claim for violation of a constitutional privacy right. Scheetz v. The Morning Call, Inc. , supra, 946 F.2d at 206-207 (citing United States Dept. of Justice Reporters Comm. for Freedom of Press, 489 U.S. 749 (1989)): Jones/Seymore v. LeFebvre, 781 F.Supp. 355,

358 (E.D.Pa. 1991), aff'd 961 F.2d 1567 (3rd Cir. 1992). Because disclosure that an individual is implicated in a police or grand jury investigation does not violate a constitutionally protected privacy interest, I will enter summary judgment on defendants' motion for summary judgment as to count I of plaintiff's second amended complaint in so far as it states a Section 1983 claim for tortious invasion of privacy.

There is no absolute right to protection against the disclosure of personal matter. F.O.P., 812 F.12 at 110. For example in Paul, the Supreme Court refused to recognize a privacy claim based upon the defendant's publication of plaintiff's arrest because "[n]one of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner." Id. at 713. Moreover, this constitutional right to privacy may not be equated with the common law right to privacy recognized under Pennsylvania tort law. Jones/Seymore v. LeFebvre, 781

F.Supp. 355, 358 (E.D.Pa. 1991), aff'd 961 F.2d 1567 (3rd Cir. 1992).

Invasion of privacy occurs when there is publicity given to private material which would be "highly offensive to a reasonable person" and is not matter which is of legitimate concern to the public. Lee 630 F. Supp. at 155. Puricelli's references to state law concerning confidentiality laws are not relevant to this matter because pennsylvania confidentiality laws do not control federal constitutional rights, Scheetz v. The Morning Call, Inc. , supra, 946 F.2d at 202, 207 (3rd Cir. 1991), cert denied, 112 S.Ct. 1171 (1992).

Puricelli does not have a constitutionally protected privacy interest in information that is a matter of public record. Paul, 424 U.S. at 712-13, 96 S.Ct. at 1165-66; Seymour, 781 F. Supp. at 358. The Third Circuit, in its F.O.P., decision, held that the city of Philadelphia could ask applicants to a special investigatory police unit about

arrest records of their family members because arrests are public. F.O.P., 812 F.12 at 117. Arrest records are not exempt from the Freedom of Information Act, and even investigatory records prepared prior to arrest are accorded only limited protection. 5 U.S.C. 552(b)(7). Under Pennsylvania law, the Criminal History Record Information Act places no limits on disclosure of arrest records to police departments and allows limited disclosure of arrests to any individual making a request. 18 Pa. Cons. Stat. Ann. 9102, 9121(a), 9121(b). Id. at 117.

Additionally, the Third Circuit affords no constitutional protection for the privacy of criminal records or for the privacy of pending criminal charges because, by definition, these are public matters. F.O.P., 812 F.12 at 117; Trade Waste Management Ass'n Inc. v. Hughey, 780 F.2d 105 (3rd Cir. 1987) (records of criminal convictions and pending criminal charges are, by definition, public. There is no federally protected privacy interest that the Attorney General violates when he uses the criminal justice information available from the Federal Bureau of Investigation to investigate the waste disposal industry. Also involuntary

fingerprinting during the course of a criminal investigation falls outside the protection provided by the Fourth Amendment and does not involve any privacy interest protected by the federal constitution. Scheetz v. The Morning Call, Inc. , supra, 946 F.2d at 202 (3rd Cir. 1991).

Puricelli maintains that he has a privacy interest in his arrest record because it has been expunged and sealed.[17] This, however, does not warrant my finding that he has a constitutionally protected right of privacy in these records. Even where an arrest record has been expunged, it still remains on court records and in police blotters, and it never truly is removed from the public records, thus

17. Although Puricelli states that his criminal record has been expunged, there is no evidence of this in the record. Rather, there is an order issued by Judge Hannum on April 14, 1983 which specifically states:

"The Court, having considered and denied Defendant's motion to expunge the records in the above entitled cause, ..."

it is not entitled to privacy protection. F.O.P., 812 F.12 at 117 n.8.

As a matter of law, summary judgment on Puricelli's invasion of privacy claim is proper as to all of the defendants.

c. Plaintiff can not maintain a Section 1983 claim for abuse of process/malicious prosecution against defendants for initiating a grand jury investigation of his involvement in an allegedly unlawful abandoned car scheme because he has not identified any facts establishing any process, such as an arrest or the filing of criminal charges, that deprived him of a constitutionally protected liberty interest without due process of law.

Puricelli asserts an "abuse of process/malicious prosecution" claim against the defendants for convening a grand jury "for the sham purpose of investigating a 'chop shop' operation which Defendant Hughes alleged was being run by the plaintiff." (Puricelli's response to Hughes' motion for summary judgment at 1.)

As I stated in Garner at 22-24:

Plaintiff is correct that viable actions for malicious prosecution and

malicious abuse of process can be maintained under Section 1983. See, Losch v. Borough of Parkesburg, 736 F.2d 903, 907-08 (3rd Cir. 1984); Jenning v. Shuman, 567 F.2d 1213, 1220 (3rd Cir. 1977); Brown v. Johnston, 675 F. Supp.287 (W.D.Pa. 1987). "State tort claims do not necessarily constitute a claim under Section 1983 but state law torts for false arrest, abuse of process, and malicious prosecution may under some circumstances also provide the basis for a claim under the section." Mines v. Kahle, 557 F.Supp 1030, 1039 n.5 (W.D. Pa. 1983) (The Third Circuit decision on Kulwicki v. Dawson, 969 F.2d 1454 (3rd Cir. 1992), disagrees with the Mines decision on the issue of absolute immunity.)

One commentator has noted [b]y now it is abundantly clear that common law torts committed by local governments or givernment employees do not, on that basis alone, constitute Fourteenth Amendment violations actionable under Section 1983. Thus, strictly speaking, it is incorrect to talk about a malicious prosecution or abuse of process action premised solely on state tort law elements. Rather, what must be identified in every 1983 case, including these, is the constitutional provision allegedly violated." S. Nahmod, Civil Rights and Civil Liberties Litigation, 3.15 (3rd ed. 1991).

Plaintiff has correctly cited Losch v. Borough of Parkesburg, 736 F.2d 903, 907-08 (3rd Cir. 1984) as authority that a malicious prosecution claim is actionable under Section 1983. In Losch, the district justice dismissed criminal charges filed against plaintiff. The court held (1) that "the filing of criminal charges without probable cause and for reasons of personal animosity is actionable under 1983" and (2) that the filing of criminal charges to penalize the plaintiff for exercising his First Amendment right to criticize the performance of public officials

was a cognizable constitutional deprivation. Id. at 907-08.

In Jenning v. Shuman, 567 F.2d 1213, 1220 (3rd Cir. 1977), the Third Circuit held that abuse of process was actionable under Section 1983 in the context of a grand jury investigation where the defendants made extortion demands on plaintiff after initiating process against him. The court found that plaintiff's constitutionally protected liberty interest was violated by the defendants' conspiracy to arrest him pursuant to falsely sworn criminal complaint in order to effectuate the extortion: "Such deprivations without [procedural] due process state an injury actionable under section 1983." Id. at 1220

Viewing the facts in a light most favorable to Puricelli, he has failed to state a claim for abuse of process and malicious prosecution. Like Garner and unlike the Plaintiffs in Losch and Jennings Puricelli was never charged with a crime, indicted or arrested. No process ever issued.

As a matter of law summary judgment on this claim is appropriate as to all the defendants.[18]

d. Procedural Due Process Rights under Pennsylvania Police Tenure Act and Pennsylvania Borough Code

Puricelli suggests that Wrightstown, Hughes and Yardley violated his right to procedual due process when Wrightstown fired him and Yardley suspended him without notice and opportunity for a hearing. (see Puricelli's response to Wrightstown defendants' motion for summary judgment.) Puricelli must have a constitutionally protected property interest in his employment before he is entitled to received procedural due process. I must look to state law to determine whether Puricelli has a constructionally protected property interest in his employment as a police office. Cleveland Bd. of Ed. v. Loudermill, 470 U.S.

18. Although it does not include a count specifically asserting a conspiracy claim, Puricelli's fourth amended complaint also alleges that the defendants "conspired" to deprive him of his constitutionally protected rights. (see fourth amended complaint at 39, 44, 48, 50.) "Section 1983 does not create a cause of action per se for conspiracy to deprive one of a constitutional right. Without an actual deprivation, there can be no liability under Section 1983." Defeo v. Sill, 810 F.Supp. 648, 658 (E.D. PA. 1993); see also Dixon v. City of Lawton, Okl., 898 F.2d 1443, 1449 (10th Cir. 1990).

532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

In Pennsylvania, the Police Tenure Act, 53 P.S. 811 et seq., and the Borough Code, 53 P.S. 45101 et seq., are the potentially relevant state laws. Both of these statutes provide extensive procedural protections to Puricelli, including the right to demand a public hearing and the right to appeal the result of a public hearing to the Pennsylvania courts. 53 P.S. 814, 815, 53 P.S. 46191. There is no indication in the record that Puricelli ever availed himself of these procedural protections.

Puricelli's procedural due process claims are not "ripe for federal disposition" because he has neither sought relief under the procedures provided by these act nor claimed that such relief would be ineffective. Schull v. Borough of Wilson. 1993 WL 29142 (E.D.Pa. 1993). The Third Circuit recently stated that there is a preference for "holding federal civil rights claims in abeyance until state appellant proceedings that may affect the

outcome of the federal action are decided." Linnen v. Armainis, No. 92-3350 (3rd Cir. April 9, 1993) In the earlier decision of Bailey v. Ness, 733 F.2d 279 (3rd Cir. 1984), the Third Circuit held that it was improper for the district court to dismiss the plaintiff's civil rights claims because plaintiff had an appeal of her underlying criminal conviction pending in Pennsylvania state court at the time. According to the Third Circuit, the proper course of action is to stay the federal cause of action "until the state court proceeding have run their course or have run out of time in which to be brought." Bailey, 733 F.2d at 283.

For this reason, I will stay Puricelli's procedural due process claims and will allow him opportunity to exhaust the procedural remedies set forth in these acts. As set forth in accompanying order, Puricelli will have 90 days from this ruling to commence any procedural due process claims pursuant to either of these acts. I will rule on any

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procedural due process issue after Puricelli has exhausted these state remedies.

CONCLUSION

The parties to this lawsuit have personal and complicated disputes with each other and these disputes ultimately caused the parties to suffer injuries. As I have discussed at length, the key issue is whether these injuries rise to the level of a deprivation of due process under the United States Constitution. I hold that they do not. For this reason, I will grant summary judgment in favor of all defendants and against plaintiff on all Section 1983 claims except for the stay claims alleging procedural due process violations arising under the Pennsylvania Police Tenure Act and the Pennsylvania Borough Code. To the extent that Puricelli pleads any state law claims, I decline to exercise supplemental jurisdiction over these state law claims pursuant to 28 U.S.C. 1367(c)(3), and dismiss them without prejudice to his right to refile in state Court. (see 28 U.S.C.

1367(d), stating that claim should be filed in state court within thirty days). An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN M. PURICELLI	:	CIVIL ACTION
v.	:	
BOROUGH OF MORRISVILLE	:	NO. 89-9161

ORDER

AND NOW, this 16th day of April 1993, upon consideration of the defendants' motion for summary judgment and plaintiff's responses thereto and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

1. The motion for summary judgment of defendants Borough of Morrisville and Harry Merker is granted and judgment is entered in favor of defendants and against plaintiff on all Section 1983 claims, except claims alleging violations of procedural due process arising under the Pennsylvania Police Tenure Act and the Pennsylvania Borough Code.

2. The motion for summary judgment of defendant Walter Hughes is granted and

judgment is entered in favor of defendants and against plaintiff on all Section 1983 claims, except claims alleging violations of procedural due process arising under the Pennsylvania Police Tenure Act and the Pennsylvania Borough Code.

3. The motion for summary judgment of defendants Alan Rubenstein, Dale Reichley, William Brosha, Harry Armitage and Bucks County District Attorney's Office is granted and judgment is entered in favor of defendants and against plaintiff on all Section 1983 claims, except claims alleging violations of procedural due process arising under the Pennsylvania Police Tenure Act and the Pennsylvania Borough Code.

4. The motion for summary judgment of defendants Wrightstown Township, Ken Cronlund, George Donate, Yardley Borough, Susan Taylor and Edward Robinson is granted and judgment is entered in favor of defendants and against plaintiff on all Section 1983 claims, except claims alleging violations of procedural due

process arising under the Pennsylvania Police Tenure Act and the Pennsylvania Borough Code.

5. The Plaintiff's claims for violations of procedural due process under the Pennsylvania Police Tenure Act and Pennsylvania Borough Code against Borough of Morrisville and Harry Merker Walter Hughes Wrightstown Township, Ken Cronlund, George Donate, Yardley Borough, Susan Taylor and Edward Robinson are held in civil suspension pending his exhaustion of the procedural remedies as set forth in the Police Tenure Act and the Borough Code. Plaintiff shall have ninety (90) days from the issuance of this order to commence his procedual due process claims as set forth in the Pennsylvania Police Tenure Act and Pennsylvania Borough Code.

6. To the extent Puricelli pleads any state law claims, pursuant to 28 U.S.C. 1367(c)(3), I decline to exercise supplemental jurisdiction over these state law claims and dismiss them without prejudice to his right to file an action for these claims in state

court. [See 28 U.S.C. 1367(d), that the claim should be filed in the state court within thirty (30) days.]

|S|
ANITA B. BRODY, J.

Date: April 16, 1993.

Probationary Form No.26

CERTIFICATE OF
VACATION OF CONVICTION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :

v. : No. 76-592

BRIAN M. PURICELLI :

This is to certify that on November 16th, 1978 this Court discharged Brian Puricelli from probation prior to the expiration of the maximum period of his probation and therefore judgment of conviction entered by this Court on February 15, 1977, in United States v. Brian Puricelli, No 76-592, has been set aside pursuant to the provisions of Section 5021(b), Title 18, U.S. Code.

Nov 16th, 1978

| S |
Judge [John B. Hannum]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA Plaintiff	}	Criminal No. 76-592
v.	}	
BRIAN M. PURICELLI Defendant	}	ORDER

The Court, having considered and denied Defendant's motion to expunge the record in the above-entitled cause,

IT IS HEREBY ORDERED that the records maintained by the federal Bureau of Investigation in regard to the above-entitled cause be physically removed from the central criminal files and placed in a separate storage facility. Reference to said records on any criminal or arrest record computer shall be deleted.

IT IS FURTHER ORDERED that these records are not to be opened unless the federal Bureau of Investigation determines they are needed in the course of a bona fide criminal investigation by law enforcement authorities and only where necessary for such investigation.

IT IS FURTHER ORDERED that the United States not disseminate these records to anyone, public or private, for any purpose other than as set forth above.

IT IS FURTHER ORDERED that the records in the above entitled cause which are maintained by the Clerk's office for the U.S. District Court for the Eastern District of Pennsylvania be sealed.

DATE: April 14th, 1983

| S |

JOHN B. HANNUM
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN JONES, SR and GAIL KIM JONES	:	CIVIL ACTION
v.	:	
BUCKS COUNTY COURT OF COMMON PLEAS CRIMINAL DIVISION; BUCKS COUNTY DISTRICT ATTORNEY; MORRISVILLE BORO POLICE DEPT.; FALLS TOWNSHIP POLICE DEPT., and respective employees and agent of same; A.D.A. WILLIAMS; BOROUGH OF MORRISVILLE; HARRY FALKINSTEIN; LEE ROCKAFELLOW; JOHN HOFFMAN EDGAR SOLT; NICHOLAS PELEHATY; MICHAEL DEMECH; GEORGE MOUNT; WILLIAM MULLIN; EUGENE GAYDULA; OFFICER HERON, OFFICER ARMSTRONG; WILLIAM WAMSLEY: DALE SAXMAN RAY NEARHOOD; JAMES KETTLER; SERGEANT SCHAFFNER; LIEUTENANT CLARK; DETECTIVE DAPP; DETECTIVE COSGROVE; NICHOLAS STRILUK; OFFICER JOHN KUTALEK; MR. JOHNS; DONALD VON HOFFMAN; CHARLES E. RONALDO; JEFFERY M. WILLIAMS; ARMANDO FRALLICCIARDI	:	NO. 85-1859

MEMORANDUM AND ORDER

NORMA L. SHAPIRO, J.
July 31, 1991

On August 24, 1988, petitioner Brian Puricelli testified as a witness for the plaintiff in the jury trial in this matter. On cross examination, attorney for defendants attempted to impeach petitioner's credibility. After an in camera colloquy between petitioner and the court, the court discontinued certain inquires as to petitioner's credibility and the transcript of the in camera colloquy was ordered impounded under seal.

A petition by Brian Puricelli, pro se, for Extraordinary Relief and Enforcement of Stipulation Trial Court Order for Impoundment of Incamera Hearing Transcript and Testimony, filed in the Court of Appeals, was denied on November 23, 1990. The Court of Appeals directed the clerk to "return the record to the district court where it will be subject to whatever impoundment order the district judge deems appropriate." Puricelli then filed the pending Petition for Enforcement of Stipulation Trial Court Order Impoundment Incamera Hearing Transcript and Testimony, And

for permanent Injunction. Puricelli has certified that he caused a true and correct copy of his petition to be served upon all parties by depositing it with the United States Postal Service on November 30, 1990' the petition was unanswered and therefore unopposed.

The common law favors public access to trial materials. U.S. v. Criden, 648 F.2d 814, 823 (3rd Cir. 1981), the Court of Appeals held that the public and media were entitled to access to videotapes shown at a criminal trial. This doctrine was applied in U.S. v. Martin, 746 F.2d 964 (3rd Cir. 1984), to allow public access to audiotapes offered in evidence. In Publicker Inductries, Inc., v. Cohen, 733 F.2d 1059, 1066067 (3rd Cir., 1984) the presumption of access was extended to civil trials and records. In U.S. v. Smith, 787 F.2d 111, 115 (3rd Cir. 1986), the court applied Criden, supra, to transcripts of side bar or chambers conferences at which evidentury or substantive rulings had been

made. In Bank of America v. Hotel Rittenhouse, 800 F.2d 239 (3rd Cir. 1986) the Court of Appeals reversed a district court order sealing a settlement agreement between the parties files of record because of the common law right of access to public documents. In U.S. v. Raffoul, 826 F.2d 218 (3rd Cir. 1987), the Court of Appeals reversed a district court order denying the press access to a sealed transcript of trial testimony and remanded for a hearing to determine whether there would any prejudice to the defendant. Finally, in Littlejohn v. BIC, Corp., 851 F.2d 673 (3rd Cir. 1988), the Court of Appeals held that the introduction of exhibits at trial constitutes an order making public documents which had been deemed confidential by a pretrial protective order.

However, there are certain circumstances where a court's denial of access is appropriate. Where the risk of serious injury to third parties outweighs the public's interest in access to a limited portion of a

trial, a court may impose limitations to promote the interest of justice. See Smith, supra, 787 F.2d at 116. Where tapes would be used for "improper purpose" to gratify spite or promote scandal or to facilitate the distribution of libelous statements," a court may exercise discretion to deny copying evidence. The Court must find rebroadcasting would inflict unnecessary and intensified pain to third parties entitled to protection. See Croden, supra, 648 F.2d at 829.

This is the case her. At trial it was necessary to hold a hearing outside the presence of the jury concerning prospective cross-examination bearing on the witness's credibility. The propriety of the proposed questions implicated other proceedings, the record of which had been ordered under seal by another judge. Before the court made inquiry, the courtroom was cleared and the record of this court's in carmera discussion with the witness was ordered impounded.

That impound record, document number 287, was released accidently by the clerk in violation of this court's impoundment order. The issue here is whether the court can and should order reimpounded a document erroneously made public.

First, the court had every right to impound document number 278, a transcript of in camera discussions of another proceeding under seal. The court was showing proper respect for another judge's prior order in the interest of the proper administration of justice. Second, document number 278 was released in violation of this court's order so reimpounding would be enforcing a disregarded court order and not placing under seal a transcript initially released to the public. Third, there is substance to petitioner's claim that document number 278 has been used to inflict unnecessary and intensified pain on him. An order to reimpound document number 278 conforms to an exception to the open access

policy allowed in Smith, supra, at 116, and Criden, supra, at 829.

The policies concerning open access are embedded on common law principles assuring freedom of communication on matters related to the functioning of government, including the Judicial Branch. But the strong public interest in open court proceedings does not mean that the public's right of access is unlimited. The necessity of protecting the secrecy of an appropriate in camera inquiry is crucial for the effective administration of justice.

This court has examined the transcript of sealed document number 278 and finds that it concerns matters worthy of protection. Importantly, there were no objections to the court's initial decision to hold the in camera hearing and to seal the record, and no motions were filed at trial seeking to release sealed document number 278. In addition, no party objected to petitioner's motion to reimpound the transcript. Ordering the document

reimpounded will not compromise meaningful public control over judicial governance or the meaningful and open debate crucial to the continued existence of our republican form of government. The Court of Appeals mandate recognizes District Court discretion to impound if deemed appropriate. Document number 278 will be ordered refiled under seal and not to be released except upon further order of this court.

Petitioner also asks for relief under Pennsylvania's Criminal History Record Information Act, 18 Pa.C.S.A. 9109 et seq. (the Act). Under his Act, an individual may institute an action in a court of proper jurisdiction to enjoin any criminal justice agency, organization, or individual from violating the provisions of the Act. 18 Pa.C.S.A. 9183. Specifically, petitioner requests this court enjoin the Morrisville Borough Police Department and Chief Harry Merker, former parties to this action, from disseminating to noncriminal justice agencies

and individuals any information regarding petitioner without first "extracting[ing] from the record all notations of arrest, indictments or other information relating to the initiation of criminal proceeding where no conviction has occurred." 18 Pa. C.S.A. 9121(b)(2)(ii). In addition. the injunction would bind a State or local police department to the Act's requirement that no information should be released to an individual or noncriminal agency unless formally requested. 18 Pa. C.S.A. 9121(b), As the parties have not responded to petitioner's motion and the requested injunction makes certain only that the parties follow a state statute, the court will grant the injunction as to the parties served with notice of motion.

The court believes that the relief provided herein is sufficient to protect petitioners interests.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN JONES, SR and GAIL KIM JONES	:	CIVIL ACTION
v.	:	
BUCKS COUNTY COURT OF COMMON PLEAS CRIMINAL DIVISION; BUCKS COUNTY DISTRICT ATTORNEY; MORRISVILLE BORO POLICE DEPT.; FALLS TOWNSHIP POLICE DEPT., and respective employees and agent of same; A.D.A. WILLIAMS; BOROUGH OF MORRISVILLE; HARRY FALKINSTEIN; LEE ROCKAFELLOW; JOHN HOFFMAN EDGAR SOLT; NICHOLAS PELEHATY; MICHAEL DEMECH; GEORGE MOUNT; WILLIAM MULLIN; EUGENE GAYDULA; OFFICER HERON, OFFICER ARMSTRONG; WILLIAM WAMSLEY: DALE SAXMAN RAY NEARHOOD; JAMES KETTLER; SERGEANT SCHAFFNER; LIEUTENANT CLARK; DETECTIVE DAPP; DETECTIVE COSGROVE; NICHOLAS STRILUK; OFFICER JOHN KUTALEK; MR. JOHNS; DONALD VON HOFFMAN; CHARLES E. RONALDO; JEFFERY M. WILLIAMS; ARMANDO FRALLICCIARDI	:	NO. 85-1859

ORDER

AND NOW, this 31st day of July, upon consideration of petitioner, Brian Puricelli's unopposed Motion for Enforcement of

Stipulation Trial Court Order Impounding Incamera Hearing Transcript and Testimony and for permanent Injunction it is ORDERED that:

1. Document number 278, dated August 24, 1988, transcript of an in camera hearing in the above action, shall be reimpounded and refiled under seal. All parties who have copies of document number 278 shall send them forthwith to the deputy clerk of the court, Attention: Ms. Madeline Ward, Room 10430, U.S. Courthouse, 601 Market Street, Philadelphia, Pa. 19106; receipt will be acknowledged.

2. Morrisville Borough Police Department and Chief of Police Harry Merker, along with the State and any other local police department, are enjoined from disseminating to noncriminal justice agencies and individuals any information relating to petitioner, Brian Puricelli, except in compliance with the explicit terms of 18 PA. C.S.A. 9121.

ENTERED 8-1-91

| S |
NORMA L. SHAPIRO, J.

WRIGHTSTOWN TOWNSHIP BOARD OF SUPERVISORS
GRIEVANCE HEARING - PATROLMAN BRIAN M. PURICELLI

The Wrightstown Township Board of Supervisors in furtherance of a grievance hearing held at the request of Patrolman Brian M. Puricelli, on Monday, March 7, 1988 enters the following Findings of Fact, Conclusions of Law and Decision.

I. FINDINGS OF FACT

1. Patrolman Brian M. Puricelli, is employed on a regular basis as a part-time police officer with the Wrightstown Township Police Department.

2. On or about February 20, 1988 Patrolman Puricelli delivered a letter to the Board of Supervisors of Wrightstown Township requesting a grievance hearing concerning three matters. These concerned an alleged unlawful suspension from work due to being placed on disability by Chief Walter H. Hughes Jr., reprimands dated February 10, 1988, and certain alleged activities by Chief Hughes alleged to be designed to force him to resign.

A true and correct copy of Patrolman Puricelli's letter, dated February 20, 1988 was identified as "T1" and introduced into the record.

3. Patrolman Puricelli was represented at the grievance hearing by Theodore M. Kravitz, Esquire. Prior to the scheduled hearing, counsel for Patrolman Puricelli and the Township Solicitor, Terry W. Clemons, Esquire, agreed to schedule the hearing for Monday, March 7, 1988 at 7:00 P.M., just prior to the publicly advertised regularly {sic} meeting. Mr Kravitz agreed on behalf of Patrolman Puricelli to waive the provisions of the Police Tenure Act requiring that a hearing be held within ten days from the filing of charges and that the hearing be a "public hearing". At the hearing held on March 7, 1988 Patrolman Puricelli confirmed on the record that he agreed to waive the public hearing requirement as well as the requirement that the hearing be held within ten days of the date a hearing is demanded. Patrolman

Puricelli further agreed not to exclude members of the public as they arrive to attend the regularly scheduled township meeting. The hearing started at approximately 7:20 P.M. and concluded at 8:45 P.M. Members of the public were in attendance at the hearing.

4. The Board of Supervisors for Wrightstown Township made a determination at the hearing, acting upon the advice of their Solicitor, Terry W. Clemons, Esquire, to hear evidence only with respect to the alleged suspension of Patrolman Puricelli inasmuch as the Police Tenure Act does not require a haring on written reprimands. The final matter complained of did not relate to a suspension, removal or reduction in rank as provided in the Police Tenure Act.

5. Chief Walter H. Hughes, Jr. testified on behalf of the Wrightstown Township Police Department and Patrolman Puricelli testified on his own behalf at the hearing.

6. On January 12, 1988 Patrolman Puricelli filed an incident report, in

accordance with department procedure, relating that he was injured on duty. According to his report the Patrolman slipped on an icy patch while walking to the from door of the police department injuring his left elbow, right knee and lower back. He experienced pain in all areas mentioned and indicated he would see a doctor in daylight hours if pain in lower back and right knee continued.

7. On January 13, 1988 Chief Hughes prepared a letter to Patrolman Puricelli advising him to obtain a certificate of physical capability from his physician confirming that he has fully recovered and is able to perform his functions as a police officer without any aggravation to the injury sustained prior to the Patrolman returning to work.

8. Chief Hughes put the notice in Patrolman Puricelli's mail box at the Township building believing that he would pick it up within the next few days along with his pay check. Chief Hughes knew that Patrolman

Puricelli was taking vacation leave but believed he would pick up his paycheck prior to leaving for vacation.

9. Patrolman Puricelli customarily works weekends but was not scheduled to be in the weekend of January 15 and 16 or the weekend of January 22 and 23, 1988. He was next scheduled to work of {sic} the weekend of January 29 and 30 of 1988.

10. Chief Hughes testified that around January 15, he realized that Patrolman Puricelli had not picked up his paycheck or the letter to him and sent a copy of the letter to his home by certified mail.

11. Chief Hughes, by letter dated January 18, 1988, advised Kenneth Cronlund, Supervisor and police liaison of his action in connection with requiring a medical certificate from Patrolman Puricelli. A copy of the Chief's letter to Mr. Cronlund with the incident report attached thereto was marked "T3" and introduced into the record.

12. For reasons that are not entirely clear from the record. Patrolman Puricelli did not secure the required doctor's certificate until February 2, 1988. A true and correct copy of a note from David W. Jenkins, M.D. dated 2/2/88 and verifying that Patrolman Puricelli had completely recovered from his injuries and could resume full activities as policeman was marked "T4" and introduced into the record.

13. The tardiness in obtaining the requested doctor's certificate appears to be part due to Patrolman Puricelli being on vacation and a time lag in securing a doctor's appointment.

14. The Wrightstown Township Police department consists of two full-time police officers, including Chief Hughes and Sergeant Charles Wurst and a number of part-time officers (approximately five in number) who are scheduled to provide additional police coverage to the regular shifts worked by the full-time officers.

15. It is customary practice in the police department for the Chief and/or Sergeant to get together with the part-time employees at the end of each month to work out scheduling details for the following month. Since the part-time police have other jobs, frequently with other police departments, this meeting is essential for determining the availability of different officers and coordinating their schedules in order to provide police coverage for the Township.

16. Patrolman Puricelli had been scheduled to work January 30 and 31 of 1988 but was removed from the scheduling due to the Chief not having received the required doctor's certificate.

17. For reasons that are not clear from the record Patrolman Puricelli did not attend the meeting at the end of January where the February schedule was made up. He did, however, attend an informal meeting with the Board of Supervisors on or about February 1, 1988 where he aired certain complaints

concerning his treatment by Chief Hughes, including, among other things, the requirement the he get a doctor's certificate as a result of his fall.

18. Chief Hughes did not schedule Patrolman Puricelli for any time during the month of February since he had not provided the doctor's certificate prior to the time the February schedule was made up and did not attend the January meeting where the schedule was prepared.

19. Patrolman Puricelli did not work any "active duty" hours in February 1988. He did attend court hearings as needed on cases where he was the investigating officer.

20. Prior to January, 1988 Patrolman Puricelli worked between 20 to 24 hours a week as a regularly scheduled employee. He was also called on an as needed basis to cover shifts when other officers were available and may have averaged as many as 32 to 36 hours per week.

21. For the month of March, 1988 Patrolman Puricelli was scheduled as part of the regular schedule to work 12 hours per week. However, during the first week in March he worked an additional 8 hours. Chief Hughes stated that the reason Patrolman Puricelli had been scheduled for only 12 hours was due to scheduling problems that had developed in connections with Patrolman Puricelli's employment with the Yardley Borough Police Department. He produced two memos from Patrolman Puricelli, one dated December 30, 1987 and another dated January 6, 1988 in support of his position that Puricelli's unavailability to work certain shifts created difficulties in scheduling him a full 20 hours each week. These Exhibits are marked "T7" and "T8" respectively and admitted into the record. In addition, the schedules for January of 1988 and March 1988 were marked Exhibits "T5" and "T6" respectively and admitted into the record. Patrolman Puricelli verified that with the number of part-time police officers

there has been continuous problems in working out schedules and that at least three different methods had been used since his employment with the Township to try to deal with the scheduling difficulties. Patrolman Puricelli stated, however, that with the exception of his unavailability for the 4-12 shifts on weekends, he is otherwise available for police duty.

22. As to the injuries sustained by Patrolman Puricelli on January 12, 1988, he testified that he considered the injuries to be minor and felt as thought he was fully able to return to work the weekend of January 30. He stated he believed the Chief was being unreasonable in requiring a doctor's certificate and that he was aware of other persons employed by the police department who sustained minor injuries and were not required to get a doctor's certificate.

23. Chief Hughes testified he believed the injuries reported by Patrolman Puricelli were serious enough to warrant a doctor's

examination and that he required an examination due to his concerns respecting a possible workman's compensation claim. He also expressed concern over the possible aggravation of the Patrolman's injuries if he returned to work and quite possibly a workman's compensation claim related thereto. Chief Hughes stated that he was particularly concerned because of the reported injuries to Patrolman Puricelli's lower back.

24. Patrolman Puricelli testified that he didn't consider his injuries serious enough to obtain further medical treatment as has indicated in the incident report.

25. The Board of Supervisors of Wrightstown Township finds that Chief Hughes has the authority to require a doctor's certificate when an officer is injured on duty and that his exercise of his authority was reasonable under the circumstances of the present case.

26. The Board of Supervisors of Wrightstown Township finds that the delay in

rescheduling Patrolman Puricelli for duty was related to his delay in securing the doctor's certificate, the difficulties related to scheduling part-timer police officers requiring that the schedule be made up a month in advance in a breakdown in communications between Chief Hughes and Patrolman Puricelli.

27. The Board of Supervisors of Wrightstown Township finds that the failure to schedule Patrolman Puricelli for the month of February was related to the aforementioned scheduling difficulties and did not amount to a suspension.

28. The Board of Supervisors of Wrightstown Township is satisfied that, based upon the scheduling difficulties for part-time officers, Chief Hughes has a reasonable basis for scheduling Patrolman Puricelli for only 12 hours per week in his March schedule. However, given that Patrolman Puricelli has been regularly scheduled for 20 hours per week. the Board will direct Chief Hughes to revise the schedule for the remainder of March to provide

at least 20 hours of duty per week for Patrolman Puricelli which will not include any weekend shifts between the hours of 4 and 12 P.M. The Board further directs that Chief Hughes schedule Patrolman Puricelli to work not less than 20 hours per week as part of his regular schedule and taking into consideration that Patrolman Puricelli is scheduled to work a a 3-11 shift on weekends for Yardley Borough for the remainder of the year. Chief Hughes shall so schedule Patrolman Puricelli unless the circumstances warrant different scheduling or Patrolman Puricelli and Chief Hughes agree to a different scheduling arrangement.

II CONCLUSION OF LAW

1. The Board of Supervisors of Wrightstown Township are not required under the Police Tenure Act to hold hearings for written reprimands. The rules and regulations for the Wrightstown Township Police Department provide that an officer who has been issued a written reprimand shall have the right to

place a response to that written reprimand in his personnel file. Since the written reprimands do not involve a termination, suspension or reduction in rank, Patrolman Puricelli is not entitled to a grievance hearing under the Police Tenure Act or under the Rules and Regulations of the Wrightstown Township Police Department. He is, however, entitled to state a response to any written reprimand which shall become a part of his personnel file.

2. Since the third matter complained of in Patrolman Puricelli's letter of February 20, 1988 does not involve a termination, suspension or reduction in rank, the Police Tenure act does not require that a public hearing be held concerning the matter raised therein.

3. Requiring Patrolman Puricelli to submit a certificate from a doctor establishing that he has fully recovered from his injuries and is able to resume his duties as a police officer as a condition to

returning to work, does not amount to a suspension from duty. Patrolman Puricelli is not entitled to payment for any days he was not permitted to work due to his failure to furnish the required doctor's certificate.

4. The failure to schedule Patrolman Puricelli during the February work schedule was due to the Patrolman's delay in providing the necessary doctor's certificate, to Patrolman Puricelli's not attending the meeting at which the February schedule was made up and to scheduling difficulties related to part-time employment. The failure to schedule Patrolman Puricelli during the month of February did not amount to a suspension from duty.

5. The scheduling of Patrolman Puricelli for 12 hours per week during the month of March rather than 20-25 hours which he had regularly worked in the past was due to scheduling difficulties created by conflicts with his other part-time employees. The reduction in the number of hours for which

Patrolman Puricelli was scheduled does not amount to a suspension from duty.

III DECISION

AND NOW, this 25 day of March, 1988 based upon the above Findings and Conclusions of Law, it is the decision of the Board of Supervisors of Wrightstown Township that Patrolman Puricelli has not been suspended from duty and is not entitled to any additional pay for periods of time he was not scheduled to work. The Board of Supervisors orders and directs Chief Hughes, Jr. to revise the employment schedule for the remainder of March and monthly schedules thereafter to provide Patrolman Puricelli not less than 20 regularly scheduled hours per week and that in making out such schedule to give consideration to the unavailability to Patrolman Puricelli to work 4-12 shifts due to his scheduling with Yardley Borough. Any variance from this direction must be approved in advance by

either Patrolman Puricelli or the Wrightstown Township Board of Supervisors.

Michale Martin, Supervisor, did not participate in this decision inasmuch as he was unable to attend the grievance hearing.

BOARD OF SUPERVISORS OF
WRIGHTSTOWN TOWNSHIP

| S |
Kenneth Cronlund, Chairman

| S |
George Donate

| S |
Terry W. Clemons, Solicitor

28 U.S.C. 534 Acquisition, preservation, and exchange of identification records; appointment of officials

(a) The Attorney General shall-

(1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records; and

(2) exchange these records with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.

(b) The exchange of records authorized by subsection (a) (2) of this section is subject to cancellation if dissemination is made outside the receiving departments or related agencies.

(c) The Attorney General may appoint officials to perform the functions authorized by this section.

28 U.S.C. 455 Interest of justice or judge.

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

28 U.S.C. 1291 Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the

Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. 1332 Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between-

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefore is otherwise made in a statute of the United States, where the plaintiff who files the case originally in Federal courts is finally adjudged to be entitled to recover

less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a part-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. 1367 Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall involve claims that involve the joinder or intervention of additional parties.

(b) In any civil cation of which the district courts have original jurisdiction

founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if-

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a) and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

42 U.S.C. 1983 Civil action for the deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 CONSOLIDATED FEDERAL REGS
PART 20 - CRIMINAL JUSTICE INFORMATION SYSTEMS
28 CFR
Subpart A - General Provisions

20.1 Purpose.

It is the purpose of these regulations to assure that criminal history record information wherever it appears is collected, stored, and disseminated in a manner to insure the completeness, integrity, accuracy and security of such information and to protect individual privacy.

20.2 Authority.

These regulations are issued pursuant to sections 501 and 524(b) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended u the Crime Control Act of 1973; Pub. L 93-83, 87 Stat. 197, 42 U.S.C. 3701, *et seq*. (Act). 28 U.S.C. 534, and Pub. L. 92-544, 86 Stat. 1115.

20.3 Definitions.

As used in these regulations:

(a) "Criminal history record information system" means a system including the equipment, facilities, procedures, agreements, and organizations therefor, for the collection, processing, preservation or dissemination of criminal history record information.

(b) "Criminal history record information" means information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, sentencing, correctional supervision, and release. The term does not include identification information such as

fingerprint records to the extent that such information does not indicate involvement of the individual in the criminal justice system. State and Federal Inspector General Offices are included.

(c) "Criminal justice agency" means: (1) Courts; (2) a government agency or any subunit therefor which performs the administration of criminal justice pursuant to a statute or executive order, and which allocates a substantial part of its annual budget to the administration of criminal justice.

(d) The "administration of criminal justice" means performance of any of the following activities: Detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders. The administration of criminal justice shall include criminal identification activities and the collection, storage, and dissemination of criminal history record information. State and Federal Inspector General Offices are included.

(e) "Disposition" means information disclosing that criminal proceedings have been concluded, including information disclosing that the police have elected not to refer a matter to a prosecutor or that a prosecutor has elected not to commence criminal proceedings and also disclosing the nature of the termination in the proceedings; or information disclosing that proceedings have been indefinitely postponed and also disclosing the reason for such postponement. Dispositions shall include, but not be limited to, acquittal, acquittal by reason of insanity, acquittal by reason of mental incompetence, case continued without finding, charge dismissed, charge dismissed due to insanity, charge dismissed due to mental incompetency, charge still pending due to insanity, charge still pending due to mental incompetence, guilty plea, nolle prosequi, no paper, nolle contendere plea, convicted, youth offender determination, deceased deferred disposition, dismissed action, found insane, found mentally incompetent, pardoned, probation before conviction, sentence commuted adjudication withheld, mistrial-defendant discharged, executive clemency, placed on probation, paroled, or released form correctional supervision.

(f) "Statute" means an Act of Congress or State legislature of a provision of the Constitution of the United States or of a State.

(g) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(h) An "executive order" means an order of the President of the United States or the Chief Executive of a State which has the force of law and which is published in a manner permitting regular public access thereto.

(i) "Act" means the Omnibus Crime Control and Safe Streets Act, 42 U.S.C. 3701, *et seq.*, as amended.

(j) "Department of Justice criminal history record information system" means the Identification Division and the Computerized Criminal History File systems operated by the Federal Bureau of Investigation.

(k) "Nonconviction data" means arrest information without disposition of an interval of one year has elapsed from the date of arrest and no active prosecution of the charge is pending; or information disclosing that the police have elected not to refer a matter to a prosecutor, or that a prosecutor has elected not or commence criminal proceedings, or that proceedings have been indefinitely postponed, as well as all acquittals and all dismissals.

(l) "Direct access" means having the authority to access the criminal history record data base, whether by manual or automated methods.

Subpart B - State and Local Criminal History Record Information Systems

20.20 Applicability.

(a) The regulations in this subpart apply to all State and local agencies and individuals collecting, storing, or disseminating criminal history record information processed by manual or automated operation where such collection, storage, or dissemination has been find in whole or in part with finds made available by the Law Enforcement Assistance Administration subsequent to July 7, 1973, pursuant of Title I of the Act. Use of information obtained form the FBI Identification Division or the FBI/NCIC system shall also be subjected to limitations contained in Subpart C.

(b) The regulations in this subpart shall not apply to criminal history card information contained in:

(1) Posters, announcements, or lists for identifying or apprehending fugitives or wanted persons;

(2) Original records of entry such as police blotters maintained by criminal justice agencies, complied chronologically and required by law or long standing custom to be made public, if such records are organized on a chronological basis;

(3) Court records of public judicial proceedings;

(4) Published court or administrative opinions or public judicial, administrative or legislative proceedings;

(5) Records of traffic offenses maintained by State departments of transportation, motor vehicles or the XXX thereof for the purpose of regulating the issuance, suspension, revocation, or renewal of driver's, pilot's or other operators' licenses;

(6) Announcements of executive clemency.

(c) Nothing in these regulations prevents a criminal justice agency from disclosing to the public criminal history record information related to the offense for which an individual is currently within the criminal justice system. Nor is a criminal justice agency prohibited from confirming prior criminal history record information to members of the news media or an other person, upon specific inquiry as to whether a named individual was arrested, detained, indicted, or whether an information or other formal charge was filed, on a specified date, if the arrest record information or criminal record information disclosed is based on data excluded by paragraph (b) of this section. The regulations do not prohibit the dissemination of criminal history record information for purposes of international travel, such as issuing visas and granting of citizenship.

20.21 Preparation and submission of a Criminal History Record Information Plan.

A plan shall be submitted to OJARS by each State on March 16, 1976, to set forth all operational procedures, except those portions relating to dissemination and security. A supplemental plan covering these portions shall be submitted no late than 90 days after promulgation of these amended regulations. The plan shall set forth operational procedures to-

(a) *Completeness and accuracy.* Insure that criminal history record information is complete and accurate.

(1) Complete records should be maintained at a central State repository. To be complete, a record maintained at a central State repository which contains information that an individual has been arrested, and which is available for dissemination, must contain information of any dispositions occurring within the State within 90 days after the disposition has occurred. The above

shall apply to all arrests occurring subsequent to the effective date of these regulations. Procedures shall be established for criminal justice agencies to query the central repository prior to dissemination of any criminal history record information unless it can be assured that the most up-to-date disposition data is being used. Inquiries of a central State repository shall be made prior to any dissemination except in those cases where time is of the essence and the repository is technically incapable of responding within the necessary time period.

(2) To be accurate means that no record containing criminal history record information shall contain erroneous information. To accomplish this end, criminal justice agencies shall institute a process of data collection, entry, storage, and systematic audit that will minimize the possibility of recording and storing inaccurate information and upon finding inaccurate information of a material nature, shall notify all criminal justice agencies known to have received such information.

(b) *Limitations on dissemination.* Insure that dissemination of nonconviction data has been limited, whether directly or through any intermediary only to:

(1) Criminal justice agencies for purposes of the Administration of criminal justice and criminal justice agency employment;

(2) Individuals and agencies for any purpose authorized by statute, ordinance, executive order, or court rule, decision, or order, as construed by appropriate State of local officials or agencies.

(3) Individuals and agencies pursuant to a specific agreement with a criminal justice agency to provide services required for the administration of criminal justice pursuant to that agreement. The agreement shall specifically authorize access to data, limit the use of data to purposes for which given, insure the security and confidentiality of the

data consistent with these regulations, and provide sanctions for violation thereof;

(4) Individuals and agencies for the express purpose of research, evaluative, or statistical activities pursuant to an agreement with a criminal Justice agency. The agreement shall specifically authorize access to data, limit the use of data to research, evaluative or statistical purposes, insure the confidentiality and security of the data consistent with these regulations and with section 524(a) of the Act and all regulations implementing section 524(a), and provide sanctions for the violation thereof. These dissemination limitations do not apply to conviction data.

(c) *General policies on use and dissemination.* (1) Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.

(2) No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.

(3) Subsection (b) does not mandate dissemination of criminal history record information to any agency or individual. States and local governments will determine the purposes which dissemination of criminal history record information is authorized by State law, executive order, local ordinance, court rule, decision or order.

(d) *Juvenile records.* Insure that dissemination of records concerning proceeding relating to the adjudication of a juvenile as delinquent or requiring supervision (or the equivalent noncriminal justice agencies is , unless a statute, court ordinance, or court decision specifically authorizes dissemination of juvenile records, except to the same extent as criminal history records may be disseminated as provided in paragraph (b) (3) and (4) of this section.

(e) *Audit.* Insure that annual audits of a representative sample of State and local criminal justice agencies chosen on a random basis shall be conducted by the State to verify adherence to these regulations and that appropriate records shall be retained to facilitate such audits. Such records shall include, but are not limited to, the names of all persons or agencies to whom information is disseminated. The reporting of a criminal justice transaction to a State, local or Federal repository is not a dissemination of information.

(f) *Security.* Wherever criminal history record information is collected, stored, or disseminated, each State shall insure that the following requirements are satisfied by security standards established by State legislation, or in the absence of such legislation, by regulations approved or issued by the Governor of the State.

(1) Where computerized data processing is employed, effective and technologically advanced software and hardware designs are instituted to prevent unauthorized access to such information.

(2) Access to criminal history record information system facilities, systems operating environments, data file contents, whether while in use or when stored in a media library, and system, documentation is restricted to authorized organizations and personnel.

(3)(i) Computer operations, whether separated or shared, which support criminal justice information systems, operate in accordance with procedures developed or approved by the particular criminal justice agencies that XXX that:

(a) Criminal history record information stored by the computer in such manner that it cannot be modified, destroyed, accessed, changed, purged, or XXX in any fashion by non-criminal justice terminals.

(b) Operation programs are used that will prohibit inquiry, record updates, or

destruction of records, form any terminal other than criminal justice system terminals which are so designated.

(c) The destruction of records is limited to designated terminals under the direct control of the criminal justice agency responsible for creating or sorting the criminal history record information.

(d) Operational programs are used to detect and store for the output of designated criminal justice agency employees all unauthorized attempts to penetrate any criminal history record information system. program or file.

(e) The programs specified in paragraphs (f)(3)(i) (b) and (d) of this section are known only to criminal justice agency employees responsible for criminal history record information system control or individuals and agencies pursuant to a specific agreement with the criminal justice agency to provide such programs and the program(s) are kept continuously under maximum security condition.

(f) Procedures are instituted to assure that an individual or agency authorized direct access is responsible for (1) the physical security of criminal history record information under its control or in its custody and (2) the protection of such information from unauthorized access, disclosure or dissemination.

(g) Procedures are instituted to protect any central repository of criminal history record information from unauthorized access, theft, sabotage, fire, flood, wind, or other natural or manmade disasters.

(ii) A criminal justice agency shall have the right to audit, monitor and inspect procedures established above.

(4) The criminal justice agency will:

(i) Screen and have the right to reject for employment, based on good cause, all personnel to be authorized to have direct access to criminal history record information.

(ii) Have the right to initiate or cause to be initiated administrative action leading to the transfer or removal of personnel authorized to have direct access to such information where such personnel violate the provisions of these regulations or other security requirements established for the collection, storage, or dissemination of criminal history record information.

(iii) Institute procedures, where computer processing is not utilized, to assure that an individual or agency authorized direct access is responsible for

(a) The physical security of criminal history record information under its control or in its custody and

(b) The protection of such information form unauthorized access, disclosure, or dissemination.

(iv) Institute procedures, where computer processing is not utilized, to protect any central repository of criminal history record information from unauthorized access, theft, sabotage, fire, flood, wind, or other natural or manmade disasters.

(v) Provide that direct access to criminal history record information shall be available only to authorized officers or employees of a criminal justice agency and, as necessary, other authorized personnel essential to the proper operation of the criminal history record information system.

(5) Each employee working with or having access to criminal history record information shall be made familiar with the substance and intent of these regulations.

(g) *Access and review*. Insure the individual's right to access and review of criminal history record information for purposes of accuracy and completeness by instituting procedures so that-

(1) Any individual shall, upon satisfactory verification of his identity, be entitled to review without undue burden to either the criminal justice agency or the individual, any criminal history record

information maintained about the individual and obtain a copy thereof when necessary for the purpose of challenge or correction.

(2) Administrative review and necessary correction of any claim by the individual to whom the information relates that the information is inaccurate or incomplete is provided;

(3) The State shall establish and implement procedures for administrative appeal where a criminal justice agency refuses to correct challenged information to the satisfaction of the individual to whom the information relates;

(4) Upon request, an individual whose record has been corrected shall be given the names of all non-criminal justice agencies to whom the data has been given;

(5) The correcting agency shall notify all criminal justice recipients of corrected information; and

(6) The individual's right to access and review of criminal history record information shall not extend to data contained in intelligence, investigatory, or other related files and shall not be construed to include any other information than that defined by 20.3(b).

Subpart C - Federal System and Interstate Exchange of Criminal History Record Information

20.30 Applicability.

The provisions of this subpart of the regulations apply to any Department of Justice criminal history record information system that serves criminal justice agencies in two or more states and to Federal, state and local criminal justice agencies to the extent that they utilize the services of Department of Justice criminal history record information systems. These regulations are applicable to both manual and automated systems.

20.31 Responsibilities.

(a) The Federal Bureau of Investigation (FBI) shall operate the National Crime Information enter (NCIC), the computerized information system which includes telecommunications lines and any message switching facilities which are authorized by law or regulation to link local, state and Federal criminal justice agencies for the purpose of exchanging NCIC-related information. Such information includes information in the Computerized Criminal History (CCH) File, a cooperative Federal-State program for the interstate exchange of criminal history record information. CCH shall provide a central repository and index of criminal history record information for the purpose of facilitating the interstate exchange of such information among criminal justice agencies.

(b) The FBI shall operate the Identification Division to perform identification and criminal history record information functions for Federal, state and local criminal justice agencies, and for noncriminal justice agencies and other entities where authorized by Federal statute pursuant to Pub. L. 92-544 (86 Stat. 1115), Presidential executive order, or regulation of the Attorney General of the United States.

(c) The FBI Identification Division shall maintain the master fingerprint files on all offenders included in the NCIC/CCH File for the purposes of determining first offender status and to identify those offenders who are unknown in states where they become criminally active but known in other states through prior criminal history records.

20.32 Includable offenses.

(a) Criminal history record information maintained in any Department of Justice criminal History record information system

shall include serious and/or significant offenses.

(b) Excluded from such a system are arrests and court actions limited only to non-serious charges, e.g., drunkenness, vagrancy, disturbing the peace, curfew violation, loitering, false fire alarm, non-specific charges of suspicion or investigation, traffic violations (except data will be included on arrests for manslaughter, driving under the influence of drugs or liquor, and hit and run). Offenses committed by juvenile shall also be excluded unless a juvenile offender is tried in court as an adult.

(c) The exclusions enumerated above shall not apply to Federal manual criminal history record information collected, maintained and compiled by the FBI prior to the effective date of these Regulations.

20.33 Dissention of criminal history record information.

(a) Criminal history record information contained in any Department of Justice criminal history record information system will be made available:

(1) To criminal justice agencies for criminal justice purposes; and .

(2) To Federal agencies authorized to receive it pursuant to Federal statute or Executive order.

(3) Pursuant to Pub. L 92-544 (Stat. 115) for use in connection with licensing or local/state employment or for other uses only if such dissemination is authorized by Federal or state statutes and approved by the Attorney General of the United States. When no active prosecution of the charge is known to be pending arrest data more than one year old will not be disseminated pursuant to this subsection unless accompanied by information relating to the disposition of that arrest.

(4) For issuance of press releases and publicity designed to effect the apprehension

of wanted persons in connection with serious or significant offenses.

(b) The exchange of criminal history record information authorized by paragraph (a) of this section is subject to cancellation if dissemination is made outside the receiving departments or related agencies.

(c) Nothing in these regulations prevents a criminal justice agency from disclosing to the public factual information concerning the status of an investigation, the apprehension, arrest, release, or prosecution of an individual, the adjudication of charges, or the correctional status of an individual which is reasonably contemporaneous with the event to which the information relates.

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONSTITUTION

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any

law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

2 Pa.C.S.A. 501. Scope of subchapter

(a) **General Rule.**- Except as provided in subsection (b), this subchapter shall apply to all Commonwealth agencies.

(b) **Exception.**- None of the provisions of this subchapter shall apply to:

(1) Proceedings before the Department of Revenue, Auditor General or Board of Finance and Revenue, involving the original settlement, assessment or determination or resettlement, reassessment or redetermination, review or refund of taxes, interest or payments made into the Commonwealth treasury.

(2) Proceedings before the Secretary of the Commonwealth under the act of June 3, 1937 (P.L. 1333, No. 320), known as the Pennsylvania Election Code.

(3) Proceedings before the Department of Transportation involving matters reviewable under 42 Pa.C.S. 933 (relating to appeals from government agencies).

(4) Proceedings before the State System of Higher Education involving student discipline.

2 Pa.C.S.A. 504 Hearing and record.

No adjudication of a Commonwealth agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard. All testimony shall be stenographically recorded and a full and complete record shall be kept of the proceedings.

2 Pa.C.S.A. 553. Hearing and record

No adjudication of a local agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard. All testimony may be stenographically recorded and a full and complete record may be kept of the proceedings. In the event all testimony is not stenographically recorded and a full and complete record of the proceedings is not provided by the local agency, such testimony shall be stenographically recorded and a full and complete record of the proceedings shall be kept at the request of any party agreeing to pay the costs thereof.

53 Pa.C.S.A. 811. Application of law

This act shall apply to each township of the second class. to each borough and township of the first class having a police force of less than three members and not subject to sections one thousand one hundred sixty-five through one thousand one hundred ninety of the act, approved the fourth day of May, one thousand nine hundred twenty-seven (Pamphlet Laws 519), known as "The Borough Code", and their amendments, nor to sections six hundred twenty-five through six hundred fifty of the act, approved the twenty-fourth day of June, one thousand nine hundred thirty-one (Pamphlet Laws 1206), known as "The First Class Township Code", and their amendments.

53 Pa.C.S A. 812. Removals

No person employed as a regular full time police officer in any police department of any township of the second class, or any borough or township of the first class within the scope of this act, with the exception of policemen appointed for a probationary period of one year or less, shall be suspended, removed or reduced in rank except for the following reasons: (1) physical or mental disability affecting his ability to continue in service, in which case the person shall receive an honorable discharge from service; (2) neglect or violation of any official duty; (3) violating of any law which provides that such violations constitutes a misdemeanor or felony; (4) inefficiency, neglect, intemperance, disobedience of orders, or conduct unbecoming an officer; (5) moved for religious, racial or political reasons. A written statement of any charges made against any person so employed shall be furnished to such person within five days after the same are filed.

53 Pa. C.S.A. 814. Hearings on dismissals

If the person sought to be suspended or removed shall demand a public hearing, the demand shall be made to the appointing authority. Such person may make written answers to any charges filed against him. The appointing authority shall grant him a public hearing, which shall be held within a period of ten days from the filing of charges in writing, and written answers thereto filed within five days, and may be continued by the appointing authority for cause or at the request of the accused. At any such hearing, the person against whom the charges are made may be present in person and by counsel. The appointing authority may suspend any such person without pay pending the determination of the charges against him, but in the event the appointing authority fails to uphold the

charges, then the person sought to be suspended or removed shall be reinstated with full pay for the period during which he was suspended, and no charges shall be officially recorded against his record. No order of suspension made by the appointing authority shall be for a longer period than one year.

A written record of all testimony taken at such hearings shall be filed with and preserved by the appointing authority, which record shall be sealed and not be available for public inspection in the event the charges are dismissed.

53 Pa. C.S.A. 816 Department and appointments without proper enactments

In any case in which a township or borough to which this act applies has heretofore appointed policemen or established a police department by lawful action of council or supervisors but not by or pursuant to an ordinance or resolution regularly enacted, such action shall be deemed to have been a valid exercise of the legislative power of the township or borough for all purposes the same as though an ordinance or resolution had been enacted, and all policemen appointed thereunder shall occupy the same status as in the case of policemen appointed under authority of an ordinance or resolution.

53 Pa. C.S.A. 46171. Appointments of police and firemen

This subdivision (j) of this article shall not apply to any borough having a police force of less than three members or to volunteer fire departments or companies employing their own operators, or to boroughs having less than three salaried operators of fire apparatus. This subdivision (j) of this article is subject as heretofore to the power of council to determine compensation. Hereafter each and every appointment to and promotion in the police force or as fire

apparatus operators paid directly by the borough in every borough shall be made only according to qualifications and fitness, to be ascertained by examinations which shall be competitive as hereinafter provided.

No person shall hereafter be suspended, removed or reduced in rank as a paid employe in any police force or as a paid operator of fire apparatus of any borough, except in accordance with the provisions of this subdivision. However, nothing in this subdivision (j) shall apply to retirement nor shall anything herein prevent any borough from adopting a compulsory retirement age for its employes or for any class or classes thereof and from retiring all such employes automatically when they reach such age.

STATE CONSTITUTION

ARTICLE I

Section 1. Inherent rights of mankind

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Section 7. Freedom of press and speech; libels

The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of

officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

Section 8. Security from searches and seizures

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or thing shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Section 25. Reservation of powers in people

To guard against transgression of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.

Section 26. No discrimination by Commonwealth and its political subdivisions

Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.

No. 94-297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

Supreme Court, U.S.
FILED
SEP 14 1994
OFFICE OF THE CLERK

BRIAN PURICELLI,

Petitioner,

VS.

BOROUGH OF MORRISVILLE; HARRY MERKER; TOWNSHIP OF WRIGHTSTOWN; WALTER J. HUGHES JR.; KEN CRONLUND, GEORGE DONAT; YARDLEY BOROUGH, SUSAN TAYLOR, EDWARD ROBINSON, THE COUNTY OF BUCKS, OFFICE OF DISTRICT ATTORNEY, ALAN RUBENSTEIN, DALE REICHLEY; WILLIAM BROSHA and DAVID ARMITAGE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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52 pp

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that petitioner's issues numbered one through seven in his Issues Presented were not properly set forth in his appellate brief where he attempted to raise them by way of incorporation and thereby circumvent the 50 page brief limit of F.R.A.P. 28(g)?

2. Whether Puricelli's due process claim arising against the Borough of Morrisville remains viable where he failed to raise this claim before the court of appeals or this Honorable Court?

3. If preserved, whether Puricelli failed to establish a due process claim since he did not have a property interest in an appointment to a position as a police officer when his name was not placed on the eligibility list as a result of his inability to pass the psychological part of the hiring process?

4. Whether the court of appeals properly determined that respondents did not injure Puricelli's reputation when they disclosed information about his criminal record where Puricelli failed to establish a tangible injury?

5. Whether the court of appeals properly determined that issue preclusion did not bar a finding that Puricelli had no privacy interest in his prior criminal record?

LIST OF PARTIES

Petitioner in this action is Brian M. Puricelli. Respondents include the Borough of Morrisville; Harry Merker, Chief of Police, Borough of Morrisville; Township of Wrightstown; Walter Hughes, Jr., Chief of Police of Wrightstown Township; Alan M. Rubenstein, District Attorney of Bucks County, Pennsylvania; Office of the District Attorney; Dale Reichley, Assistant District Attorney; Edward Brosha, David Armitage, All individually and in their official capacity; Yardley Borough; Susan Taylor; Edward Robinson; Mayor Ken Cronlund; and, George Donat.

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No. 94-297

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

BRIAN PURICELLI,

Petitioner

vs.

BOROUGH OF MORRISVILLE; HARRY MERKER; TOWNSHIP OF WRIGHTSTOWN; WALTER J. HUGHES JR.; KEN CRONLUND, GEORGE DONAT: YARDLEY BOROUGH, SUSAN TAYLOR, EDWARD ROBINSON, THE COUNTY OF BUCKS, OFFICE OF DISTRICT ATTORNEY, ALAN RUBENSTEIN, DALE REICHLEY; WILLIAM BROSHA AND DAVID ARMITAGE,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

Petitioner has invoked the jurisdiction of this Honorable Supreme Court pursuant to 28 U.S.C. § 1254(1).

On April 26, 1994, the United States Court of Appeals for the Third Circuit affirmed by way of memorandum opinion the decision of the United States District Court for the Eastern District of Pennsylvania

granting summary judgment to respondents Borough of Morrisville and Chief Harry Merker.

On July 25, 1994, petitioner filed a Petition for Certiorari which was rejected by this Honorable Court for failure to conform with Supreme Court Rule 14.

In August 1994, petitioner re-filed the Petition for Certiorari with a properly prepared Questions Presented section and cover page. The petition was thereafter accepted out of time by the Court as conforming with the Rules.

COUNTERSTATEMENT OF THE CASE

Petitioner Brian Puricelli filed four amended complaints in the United States District Court for the Eastern District of Pennsylvania against defendant-respondents the Borough of Morrisville and Chief Merker alleging various constitutional injuries. Puricelli's claims against Morrisville and Chief Merker were based upon his dismissal as a part-time police officer from the Borough's police force in 1984, the Borough's subsequent failure to hire him in 1988 as a full-time officer and Chief Merker's alleged dissemination of information regarding Puricelli's arrest, conviction and probation.

Puricelli's action was commenced under 42 U.S.C. §1983 and set forth various constitutional violations under the First, Fourth, Fifth, Eighth and Ninth and Fourteenth Amendments to the United States Constitution. Specifically, Puricelli asserted that his dismissal as a part-time police officer in 1984 resulted in the violation of his First Amendment and Fourteenth Amendment due process rights. Under his First Amendment claim, Puricelli asserted that Harry Merker, the Chief of Police for the Borough, threatened to fire and did fire him in 1984 for reporting criminal activity to the District Attorneys'

Office. Regarding his Fourteenth Amendment claim, Puricelli asserted that he was deprived of property without due process of law in that he was not provided with notice of all the charges against him nor an adequate opportunity to contest these charges before his dismissal in 1984 from his part-time position with the Borough.

Puricelli also asserted violations of his First Amendment and Fourteenth Amendment due process and equal protection rights as a result of the Borough's failure to hire him as a full-time officer in 1988. Pursuant to his complaint, Merker retaliated again in 1988 for Puricelli's asserted First Amendment activity of reporting officer criminal activity to the District Attorneys' Office. Further, Puricelli alleged that he was denied due process when the Borough failed to hire him in 1988 despite his alleged number one ranking in the eligibility pool. The Borough's failure to hire Puricelli in 1988 also formed the basis for his equal protection claim. Puricelli asserted that his equal protection rights were violated because the Borough treated him differently than other previously ranked number one candidates who were hired. Finally, Puricelli alleged that Chief Merker's alleged dissemination of information regarding his conviction and probation deprived him of a liberty interest in that he allegedly lost his status and his employment.[1]

On September 28, 1992, defendant-respondents Chief Merker and the Borough of Morrisville filed a Motion for Summary Judgment. Defendant-respondents

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[1] Puricelli also alleged violations of his Eighth and Ninth Amendment rights. However, Puricelli failed to pursue these in responding to defendant-appellees' Motion for Summary Judgement or on appeal.

argued that Puricelli's claims based on his dismissal from the Borough's force in 1984 were time barred. Further, defendant-respondents asserted that Puricelli's number one ranking on the eligibility list after the written part of the police officer's examination did not result in a property interest since Puricelli subsequently failed the psychological aspect of the test. Defendant-respondents also argued that his failure of the psychological test established that he was not similarly situated with other number one ranked candidates. This defeated his equal protection claim. Finally, defendant-respondents argued that Puricelli's claims based on Chief Merker's alleged dissemination of his criminal record were barred by the statute of limitation. Additionally, defendant-respondents argued that Puricelli failed to establish a liberty interest claim in the absence of any tangible loss.

On April 16, 1993, Judge Anita Brody granted defendant-respondents' motion (App. 32-69). However, Puricelli's claims of alleged violations of procedural due process under the Pennsylvania Police Tenure Act and the Pennsylvania Borough Code were placed in civil suspense pending Puricelli's exhaustion of the procedural remedies afforded under these provisions (App. 66-69). Thereafter, Puricelli filed a Motion for Reconsideration from Judge Brody's April 16, 1993 order alleging that he had suffered a tangible loss in support of his liberty interest claim and that he had a federally protected privacy right to keep information about his prior criminal record confidential. Further, Puricelli asserted that it was fruitless for him to pursue his claims in the administrative venue.

On September 7, 1993, Puricelli's Motion for Reconsideration was denied as untimely and because there was no clear error of law in the court's initial decision. (App. 7-18) Further, the district court removed Puricelli's

due process claims from suspense and dismissed the entire complaint. Thereafter, Puricelli appealed to the Third Circuit Court of Appeals.

On April 26, 1994, the Court of Appeals affirmed the award of summary judgment in defendant-respondents' favor (App. 1-4). The instant petition to this Honorable Court followed.

The facts underlying this action begin in 1979 when Puricelli sought employment as a police officer with the Borough of Morrisville. On February 22, 1979, Puricelli completed his application for employment with the Borough (App. 42A). In completing the application for employment, Puricelli stated that he had been convicted on a drug charge. Puricelli's application was turned over to Sgt. Potashnick to complete a background investigation. (App. 1-2A). Puricelli's fingerprints were taken, and a NCIC computer check indicated that Puricelli had been arrested in Texas for transporting 550 lbs. of marijuana. (App. 6-7A). A Federal Bureau of Investigation criminal records check was done on Puricelli. (App. 9A). The FBI criminal record received on August 18, 1979, indicated that plaintiff was arrested on July 19, 1976 for possession of marijuana with intent to deliver, that he was convicted and received three years probation. (App. 10A). Puricelli's federal probation officer intervened on his behalf with the Borough of Morrisville (App. 4-5A). The case was explained to Merker and he was told that Puricelli acted as an FBI informer (App. 4A). Puricelli was hired in July 1979 and he worked as a part-time officer up until his discharge in January of 1984. (App. 2A). Merker explained that he discharged Puricelli after receiving complaints about his performance and after he learned that he mislead authorities regarding his status as a police officer. (App. 15-18A). In order to attend wiretap

school, when his request to attend was denied by Chief Merker, Puricelli went to the Chief of Police of Tinicum Township and falsified his application. Although he was only working part-time with the Borough of Morrisville, Puricelli misrepresented his status as a full-time officer with Tinicum Township Police Department.

On April 14, 1983, Judge Hannum issued an order in which he denied a motion to expunge Puricelli's record; however Judge Hannum directed the Federal Bureau of Investigation to seal the criminal records developed in the case against Puricelli. The order also specifically provided that "the United States [was] not [to] disseminate these records to anyone, public or private..." Chief Merker was not a party to the action in which the order was entered. Though Puricelli stated that he served Chief Merker with a copy of the order, Chief Merker did not remember receiving a copy. While the order provided that the records associated with Puricelli's arrest were to be sealed, it did not purport to gag individuals not a party to the action.

After plaintiff was terminated by Morrisville in 1984, he immediately thereafter obtained employment with Wrightstown Township as a police officer. Subsequent to his employment with Wrightstown, plaintiff obtained another police officer position with Yardley Borough. While working for Yardley Borough, plaintiff was granted an educational leave of absence to attend law school at the Thomas Cooley Law School in Lansing, Michigan. Plaintiff graduated from Thomas Cooley Law School in 1991. On or about the end of April 1989 plaintiff returned from law school and returned to work at Yardley Borough. Plaintiff was suspended from Yardley after an incident with council person Susan Taylor. After plaintiff's

suspension with Yardley Borough, he got a job with the City Attorney's Office in East Lansing, Michigan.

Puricelli again applied for a position with the Borough of Morrisville in 1988. Puricelli ranked first after taking the Civil Service Exam. However, Puricelli failed to pass the psychological test given to those eligible for hiring. Puricelli admitted to suicidal tendencies, he thought about shooting himself, driving into a telephone pole or bridge abutment. As a result of the psychological test, Puricelli's name was removed from the list of eligible candidates.

SUMMARY OF THE ARGUMENT

The district court and the court of appeals properly determined that petitioner-Puricelli failed to present a viable claim for due process violations or violations of his liberty or privacy interests. Initially, Puricelli failed to preserve a number of issues for appellate review. Puricelli failed to conform to the rules governing the format and length of appellate briefs.

Substantively, Puricelli failed to establish a protected privacy interest in his criminal record nor did he establish a property interest subject to due process protection. In determining that Puricelli did not set forth any interests deserving of constitutional protection, the district court and court of appeals properly applied the controlling case law. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972). Puricelli was unable to show a legitimate claim of entitlement to the benefit sought nor was he able to demonstrate that the disclosure of his criminal record foreclosed a range of opportunities to him.

REASONS FOR DENYING THE WRIT

I.

THE JUDGMENT OF THE DISTRICT COURT AND ITS AFFIRMANCE BY THE COURT OF APPEALS ARE IN ACCORD WITH THE DECISIONS OF THIS HONORABLE COURT.

Petitioner has misapplied decisions of this Court and the various court of appeals and Pennsylvania state courts in order to argue that the previous decisions rendered in this case are inconsistent with established case law. Petitioner asks the Court to create a novel application of the "stigma plus" standard so that he may attempt once again to recover.

A. A BRIEF FILED IN DISREGARD OF THE REQUIREMENTS OF THE APPELLATE RULES IS GROUNDS FOR DISMISSAL

In his appeal to the Third Circuit, Puricelli attempted to raise eleven issues for the court's review. However, eight of those issues were not included in his appellate brief but were incorporated by reference from a previous brief. Those eight issues mirror those which Puricelli now raises before this Honorable Court at number one through seven in his Issues Presented.

Reviewing Puricelli's claims, the Court of Appeals refused to consider those issues that were only raised and argued by way of incorporation. The Court of Appeals reasoned that to allow argument by incorporation would allow Puricelli to circumvent the Rules of Appellate Procedure.

Pursuant to Rule 28(g) of the appellate rules, "except by permission of the court, or as specified by local rule of the court appeals, principals briefs shall not exceed 50 pages . . ." F.R.A.P. 28(g); 28 U.S.C. (emphasis added). By incorporating his previous brief and its discussion of the eight other issues, Puricelli exceeded the 50 page limit. Further, Puricelli never sought permission from the court to exceed the limitation placed on the length of the brief.

It is well-established that violations of appellate rules limiting the length of each party's principal brief may result in the court's striking the brief sua sponte. Neeley v. Bankers' Trust Co. of Texas, 757 F.2d 621 (5th Cir. 1985). Failure of the appellant to comply with the appeal requirements regarding the filing of briefs is in itself sufficient to justify dismissal of the appeal. Stevens v. Security Pac. National Bank, C.A., 538 F.2d 1387 (9th Cir. 1976).

Puricelli does not address this issue in his petition. However, it was clearly within the court of appeals' discretion to dismiss those issues which were not included in the brief filed by Puricelli. Since Puricelli does not challenge the dismissal of these particular issues on procedural grounds, the Court of Appeals decision to dismiss them stands. Therefore, this Honorable Court does not have jurisdiction to entertain Puricelli's substantive challenge on these initial seven issues raised herein. Puricelli has waived consideration of these claims. Furthermore, no where in Puricelli's discussion of these issues is there any mention of Chief Merker or the Borough of Morrisville. Therefore, Puricelli has waived these issues as they relate to these respondents.

B. PURICELLI WAIVED HIS DUE PROCESS CAUSE OF ACTION STEMMING FROM HIS 1988 FAILURE TO HIRE CLAIM AND FAILED TO ESTABLISH A PROPERTY INTEREST SUBJECT TO DUE PROCESS PROTECTION.

In his complaint, the basis of Puricelli's due process claim asserted against the Borough of Morrisville and Chief Merker was the Borough's failure to hire Puricelli in 1988. Puricelli alleged that his number one ranking on the eligibility list gave him a property right in a position with the Borough's police department.

However, a review of Puricelli's appellate brief and his petition to this Honorable Court reveals that this issue of a due process violation in connection with Morrisville's failure to hire him in 1988 was not presented for appellate consideration. Therefore, it is waived and not subject to this Honorable Court's review. Simmons v. City of Philadelphia, 947 F.2d 1042, 1065 (3d Cir. 1991).

Even if it were subject to such review, undisputed facts and the case law establish that Puricelli did not have a property interest in a position with the Borough's police department. "Property interests are defined, not by the constitution, but by an independent source such as state law." Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Board of Regents v. Roth, 408 U.S. at 577.

In order to be considered a deprivation of "property" for due process purposes, there must be an entitlement to property not merely a chance of acquiring property;

contingent, uncertain interests are not recognizable as property for due process purposes. Yatvin v. Madison Metropolitan School District, 840 F.2d 412 (7th Cir. 1988)(emphasis added). Puricelli cannot demonstrate that he had a legitimate claim of entitlement to be hired by the Borough.

In Roe v. Comm. of Pennsylvania, 638 F.Supp. 929 (E.D. Pa. 1986), aff'd, 813 F.2d 398 (3rd Cir.), cert. denied, 483 U.S. 1021, 107 S.Ct. 3625 (1987), plaintiff's claim was based on her failure to be chosen for the Township's gifted education program. Plaintiff argued that she had a property interest, protected by the due process clause, in being in the class for gifted students. State regulations rendered plaintiff eligible for this class but did not guarantee her placement in the class. The Court held that because plaintiff could not be certain she would be selected for the class no matter what the selection process, the plaintiff had no legitimate claim of entitlement and therefore no property interest in the gifted education class. Roe, 638 F.Supp. at 930. See also: Yale Auto Parts vs. Johnson, 758 F.2d 54 (2d Cir. 1985).

In the present case, Puricelli's contingent interest in being considered for a position with the Borough cannot qualify as a legitimate claim of entitlement. Puricelli was not guaranteed a position. To the contrary, hiring decisions were necessarily a matter committed to the discretion of the Chief and the Borough Council. Therefore, his interest in being selected for a position was not the type of property interest contemplated by the due process clause.

It is well-established that where hiring decisions are based in part on the discretionary judgment of city officials, no property interest in the position exists. Anderson v. City of Philadelphia, 845 F.2d 1216 (3d Cir. 1988). Under the

Borough Code, hiring from the eligibility list is discretionary with the Borough from among those eligible. Coles v. Judd, 7 Pa. Cmwlth. 90, 298 A.2d 687 (1973). An applicant's name is not officially on the eligibility list for employment until the commissioners have had their chance to object. Appeal of Carlson, 152 Pa. Cmwlth. 285, 618 A.2d 1206 (1992). An individual has a protected property interest in having his or her name remain on an eligibility list but not in having his or her name placed on the list. Stana v. School Dist. of Pittsburgh, 775 F.2d 122 (3d Cir. 1985). Therefore, Puricelli did not have a property interest in an appointment to a position as a police officer. His name never made it to the eligibility list.

C. THE ALLEGED DISSEMINATION OF PURICELLI'S CRIMINAL RECORD DOES NOT GIVE RISE TO A CONSTITUTIONAL CLAIM NOR DID PURICELLI ESTABLISH A PROTECTED PRIVACY INTEREST IN HIS CRIMINAL HISTORY

Puricelli's liberty interest argument is based on the improper assumption that Pennsylvania law permits recovery for alleged reputation injuries alone under §1983. While he asserted that Chief Merker's alleged dissemination of information regarding his criminal conviction and subsequent probation resulted in a loss of status and employment, Puricelli failed to show that a range of opportunities was foreclosed to him as a result of the challenged activity.

To be actionable under §1983, injury to reputation must be coupled with a tangible loss such as the extinction of a vested right or the loss of employment. Defeo v. Sill, 810 F.Supp. 648, 656 (E.D. Pa. 1993). To successfully claim a deprivation of liberty, Puricelli was required to show that defendant published a charge against him so serious that it

would damage his standing in that community and the stigma of the charges foreclosed a range of opportunities to him. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972). Defendant-respondents' challenged activity did not cause Puricelli to lose a property right or a status guaranteed by the constitution.

Despite Puricelli's arguments to the contrary, Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155 (1976) does not hold otherwise. In refusing to hold that an individual's reputation interest deserved due process protection under the liberty provisions of the due process clause, this Court stated that "the plaintiff's reputation interest is simply one of a number which the State may protect against injury by virtue of its tort law..." Paul, 424 U.S. at 712.

The Pennsylvania Supreme Court in discussing reputation rights stated that "[t]he redress provided under our body of substantive law is an action in tort for defamation." Sprague v. Walter, 518 Pa. 425, 543 A.2d 1078, 1084, (1988). Section 1983 was not intended to be a font of tort law. Recovery for reputation under Pennsylvania law is limited. Reputation injury alone is not actionable under §1983. Paul vs. Davis, 424 U.S. 693 (1976). Since Puricelli failed to satisfy the requirement that a range of opportunities be foreclosed to him, Puricelli has not demonstrated a loss of employment as a result of the challenged activity. Therefore, defendants were entitled to judgment in their favor.

Under his privacy interest claim, Puricelli sets forth a number of alleged violations of his right to privacy. Puricelli asserts that the various defendants violated his right to privacy when they revealed to each other, to the grand jury and to other community members that Puricelli was the target of a grand jury investigation, was running a "chop

shop", and that he was a drug smuggler with an arrest record. Further, Puricelli asserts that Chief Merker and the others disclosed information about his criminal conviction despite a court order sealing this record.

While the United States Constitution affords some level of protection to an individual's privacy, this protection is limited. Generally, the constitutional right to privacy consists of: (1) the right to be free of interference when making particular important decisions; and (2) the "interest in avoiding disclosure of personal matters." Jones/Seymour v. LeFebvre, 781 F.Supp. 355, 358, (E.D. Pa. 1991), aff'd 961 F.2d 1567 (3d Cir. 1992). This Honorable Court, in the decision of Whalen v. Roe, 429 U.S. 589, 598-600, 97 S.Ct. 869, 876-77, 51 L.Ed. 2d 74 (1977), held that the constitution includes and protects an individual's interest "in avoiding disclosure of personal matters" and "the interest in independence in making certain kinds of important decisions." However, these is no absolute right to protection against the disclosure of a personal matter. Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 812 F.2d 105, 110 (3d Cir. 1987).

In Paul v. Davis, supra, this Honorable Court refused to recognize a privacy claim based upon the defendants' publication of plaintiff's arrest because "[n]one of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner." 424 U.S. at 713. Additionally, this constitutional right to privacy may not be equated with the common law right to privacy recognized under Pennsylvania tort law. Jones/Seymour, 781 F.Supp. at 358.

D. PURICELLI FAILED TO ESTABLISH THE ELEMENTS NECESSARY TO THE APPLICATION OF ISSUE PRECLUSION

Finally, Puricelli argues that the trial judge was bound by previous orders of the federal court to determine that his due process and liberty interests were violated when his sealed criminal record was disclosed. However a review of the facts of this case establish that the elements of issue and claim preclusion are not satisfied. Claim preclusion gives dispositive effect to a prior judgment if the particular issue, albeit not litigated in the prior action, could have been raised. McNasby v. Crown, Cork & Seal Co., 888 F.2d 270 (3d Cir. 1989), cert denied, 494 U.S. 1066, 110 S.Ct. 1783 (1990). Issue preclusion bars re-litigation only of an issue identical to that adjudicated in the prior action. Gregory v. Chehi, 843 F.2d 111, 116 (3d Cir. 1988).

The prior federal rulings arose from complaints initiated by Puricelli. The due process and liberty interest claims were not raised previously and in the context of Puricelli's claims at that time could not have been. Therefore, Puricelli's res judicata and collateral estoppel arguments fail.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A - EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

Excerpts Chief Harry Merker's Testimony [Deposition pp. 16-17; 27; 31-33; 36-40]

A. Yes.

Q. That's what you are referring to at this point?

A. With one exception counselor, not all the records, a suit, a civil suit which is in the process in the Courts right now.

Q. This is not -- that has not been brought with you, is what you are saying?

A. No. That's the only thing that hasn't.

Q. What records are contained in the civil suit that is pending?

A. The information that was filed and served on Morrisville Borough and myself regarding a suit where Brian Puricelli is the plaintiff.

Q. So what you are saying, the only thing that you don't have with you is the legal Complaints that were filed by Mr. Puricelli, is that correct?

A. That's correct.

Q. Other than that you have all the records herein?

A. Yes. If I may retract. He applied in 1979.

Q. What month was that, do you know?

A. He was hired in July of 1979, the investigation application was prior to that, and the investigation was conducted by Sergeant Potashnick.

Q. Concerning the records that you brought with you, they are contained in three separate folders; is that correct?

A. That's correct.

* * *

Q. I'm showing you the files that you brought with you, now marked C-25-9, C-25-10 and C-25-11.

For the record, tell me what each of the files are generally?

A. C-25-9 is a file marked Puricelli, Brian, in which are correspondence, letters from the Federal Courts and an application for employment by Brian Puricelli, and a run down of his background from the State of Pennsylvania, and his references check, plus fingerprint cards which were taken which is normal routine when a man is being investigated for employment.

Q. And the other?

A. C-25-10.

Q. Which is marked, "Brian Puricelli. Confidential." Is this also Brian Puricelli's information and filed concerning him?

A. Yes.

Q. While at Morrisville Borough?

A. That's correct.

* * *

A. A federal probation officer was brought into my office by Sergeant Potashnick. And he explained that entire situation, and this is now when I found that it involved Texas; but however, he had a hearing before a federal judge in Philadelphia at a later date.

And he painted such a picture of this man being rehabilitated. He was effective in cooperation with the federal authorities, he acted more or less as an informant for the federal authorities and that he was convinced that this man was completely rehabilitated and would probably be an asset to any law enforcement department.

Q. Chief, I understand that that took place I believe by Federal Probation Officer Hippell, is that correct?

A. Yes.

Q. That took place in 1982. According to your records, if you refer to them. That's something like three years after he was hired?

A. Right.

Q. So for those three years you got no additional information as to substance of his conviction?

A. Not complete, no.

Q. So for those three years you got no additional information as to substance of his conviction?

A. Not complete, no.

Q. Is it fair to say that your department did nothing as far as investigating the answer that he gave and the interview that you had with him until 1982?

A. No. That's not correct.

* * *

fingerprint card, fingerprint card of Brian Puricelli, is that correct?

A. That's correct.

Q. This is the fingerprint card that you require of any applicant?

A. That's correct.

Q. Is there a date on that?

A. It's dated July 10, 1979, taken by Sergeant Potashnick.

Q. I notice right under the handwritten Saylor's piece of paper is another smaller piece of paper, it has notations on it; is that your handwriting?

A. Not entirely. The first part name, date of birth, social security number and chief is my handwriting; the rest of the handwriting is by Sergeant Potashnick.

Q. And Sergeant Potashnick's handwriting is in pen; is that correct?

A. That's correct.

Q. And it says arrested 7/19/76, possession of 550 pounds of marijuana?

A. Right.

Q. And it says Falfurrias, Texas, and what does it say below that?

A. Local address was 307 Miller Road, Mission, Texas. That is not my writing. It's the sergeant's.

Q. And then Sergeant Potashnick presumably advised you of this information?

A. That's correct.

Q. When did he advise you of this information?

A. After I asked Sergeant Potashick, which is one other notation in any handwriting, this is a sheet of sergeant Potashnick's NCIC. Brian Puricelli. This is where I signed it. This is what came back from the NCIC report.

Q. This would have been before you hired him?

A. No. Wait. This was after he was hired.

Q. Don't you do the NCIC check before you hire individuals as a police officer?

A. Yes.

Q. So don't you agree that was an NCIC check notation given by Sergeant Potashnick?

A. I presume it was.

Q. So the NCIC check that was done would have been done prior to hiring Brian Puricelli?

A. Yes. It possibly could.

Q. And the NCIC check noted that he had been arrested for 550 pounds of marijuana in Texas?

A. Yes.

Q. If he did that check, you knew that when you hired Brian Puricelli?

A. Yes.

Q. And now right below that notation I see a Federal Bureau of Investigation criminal record concerning Brian Puricelli?

A. That's correct.

Q. And that's what we know in the law enforcement as a rap sheet?

A. That's correct.

Q. And in paper clip, that is paper clipped to the same Saylor's note along with the note of his being arrested with 550 pounds of marijuana?

A. Yes.

Q. Is it fair to say they would have been paper clipped to, you have not changed the method in which everything has been paper clipped prior to coming here?

A. No.

Q. It is fair to say that it was done approximately the same time; is that correct?

A. That's correct.

Q. An on that statement it says Brian, it says Brian Puricelli on the Department of Justice Federal Bureau of Investigation criminal record, Brian Puricelli arrested 7/19/76, possession of marijuana with intent to deliver, and it indicates that he was convicted of such?

A. That's correct.

Q. And he received three years probation?

* * *

part-time police officer, did he at some point come forward to you and ask to be, to have you sponsor him or approve him for training to become certified in electronic wiretapping and surveillance pursuant to the Wiretap and Surveillance Act in Pennsylvania?

A. Yes. He asked to see me and presented me with application forms for certification and also application fingerprint cards to be accepted by the state police for wiretapping school.

Q. And you're aware that the law requires that his supervisor or his chief of police, in your instance, must approve his going to that school?

A. That's correct.

Q. As a matter of fact that is stated on the application, is it not?

A. Yes.

Q. Now, you have records here to indicate that he did come to you and ask to put him through this school or fund him as a police officer at Morrisville Borough to go to that school?

A. Yes.

Q. And those records are also contained in the file marked C-25-10; is that correct?

A. That's correct.

Q. Confidential file?

A. That's correct.

Q. And now, I see that you are looking at documents, can you describe what they are so that I have it for the record?

A. This is our paper stapled together. The top is my notes regarding what was in Puricelli's personnel file.

The second item is the fingerprinting card of an applicant which was taken on the 31st of March of 1981.

Q. An the application here is also one for electronics surveillance school?

A. That's correct. It is required, and it is the form that is supplied by the State Police Academy.

And the next are two copies of a Pennsylvania State Police application for certification of legal and technical aspects, wiretapping and electronic surveillance.

Q. Now, at some point did Brian Puricelli come to you with that application already filled out to the extent that it appears at the present time?

A. That's correct.

Q. And that date I believe was on April 6th, 1981?

A. It was -- it's April 6th of 1981.

Q. And what date did he fingerprint?

A. Finger printed March 31st of 1981.

Q. And that was for the purposes of going to that school?

A. That's correct.

Q. The notes that I see here is in your handwriting above that finger printed card, it that correct?

A. That's correct.

Q. And did you take those notes at the time he came to you and asked to go to the school?

A. Yeah, I did.

Q. And you stapled all three of the documents together?

A. That's correct.

Q. Now, did you advise Brian Puricelli directly that you would not sponsor him or authorize him to go to that school?

A. Yes, I did.

Q. And did you remember where that conversation took place?

A. It took place in my office.

Q. And did you make notes of that conversation?

A. Yes.

Q. And that's the note that appears there?

A. Yes.

Q. And can you tell me what those notes indicate?

A. The first item is the consensual, which means it was a consensual agreement between the state and the municipality to send the man to the school and the cost would be $250. And it was for a Class A type of instruction.

The Court authorized $500 for the tuition under a Class B.

My remarks to Brian Puricelli, and I so noted them, this would be of little use to this department in Morrisville.

We would have to go through the District Attorney for equipment and approval.

The District Attorney have enough personnel and equipment if needed. All the chief has to do is ask for it and the District Attorney men would then execute the use, expedite I guess, the uses of the equipment.

and I denied him and told him that I would not forward, or not sign the application and send it to the state police.

Q. And the application has remained with you ever since in the file?

A. Yes. It has. My name is there.

Q. Your name is there for certification but you never signed the application?

A. That's correct.

Q. But this is the application presented to you by Brian Puricelli?

A. Yes.

Q. Now, did you subsequently become aware that Brian Puricelli had taken this course?

A. Yes I did.

Q. Did you become aware of it prior to his entry into the course, or subsequent to his completion of the course?

A. After the completion of the course.

Q. So you had no information that he was actually attending the school?

A. No, I did not.

Q. Had you received any information at all from Chief Matthews concerning his attending the school prior to completion?

A. No.

Q. You do know who Chief Matthews is?

A. Yes. He is the Chief of Tinicum Township.

Q. And he was chief back at that time?

A. Yes.

Q. So it's fair to say that you never gave him permission to go to the school or to go to and ask the Tinicum Township police officer?

A. No. I did not.

Q. To your knowledge he was not employed as a Tinicum police officer in '81 and '82.

A. Not to the best of my knowledge, no.

Q. Did the police officers back in '81 and '82 have to disclose to you any employment other than what they had with Morrisville Borough Police Department?

A. Yes.

Excerpts of Affidavit of
James O'Neill, Police Supervisor,
Yardley Borough Testimony
[Affidavit pp. 5-8]

17. Upon questioning by Dale Reichley about the sealed information, I informed Mr. Reichley that he could not speak about that matter pursuant to court order. Mr. Reichley replied back "not even to the District Attorney's Office?" I replied yes.

18. On or about March 31, 1988, I did tell Brian Puricelli about Detective Brosha's two visits, the Detectives and Reichley statements and my Grand Jury testimony. But, I did not tell Brian Puricelli, until much after December 1990, that I have turned over to the District Attorney's Office, pursuant to the Grand Jury subpoena, the sealed information - which I had obtained from the federal source.

19. On or about May, 1988 while on duty, I received a phone call from Walter Hughes, Jr., who was then and is now known to me. Brian Puricelli was present for this call. I held the phone so Brian Puricelli could also hear Walter Hughes' statement. Hughes asked if I was going to suspend or fire Brian Puricelli. I asked why would I do this, saying further that "he (Brian Puricelli) is doing a fine job". Hughes replied, "Because of the Grand Jury investigation into the chop shop." I stated that I was not going to suspend or fire Brian Puricelli, and again asked why he was calling. Hughes replied, "He (Walter Hughes) could do nothing to Brian Puricelli so long as he (Brian Puricelli) was working for Yardley." I replied, "We were going to do nothing", and terminated the call.

20. On or about August 30, 1988, Brian Puricelli was granted by the Mayor of Yardley an Educational Leave of Absence to attend law school in Lansing, Michigan.

21. On or about November, 1988, Brian Puricelli was requested by the Bucks County District Attorney's Office to return to Bucks County and to testify in a criminal matter. Brian Puricelli did return.

22. On or about the end of April, 1989, Brian Puricelli returned from law school and by order of Mayor Edward Robinson, I was directed to place Brian Puricelli back on active duty and to place Brian Puricelli on full-time hours with no less than 40 hours per week. Brian Puricelli was present for this order, and I complied fully with the Mayor's order; placing Brian Puricelli in that status.

22. Prior to going on vacation (May, 1989) I issued an Order, which was approved by the Mayor, that while I was on vacation Brian Puricelli was to act in charge and control of the administrative duties of the department.

23. On or about May, 1989, I received a phone call while on duty. The call was from the Bucks County District Attorney's Office. Present for the call was Brian Puricelli and a third officer. The Assistant District Attorney who was calling at first did not identify himself, but upon my inquiry as to his name, he stated that he was David Zellis. Zellis inquired into the reason Brian Puricelli was working for Yardley Borough Police Department. I asked why he was asking. Zellis stated he was "calling and acting under direct authority and instructions of District Attorney Alan Rubenstein." I asked again why he was calling. Zellis stated "they, Alan Rubenstein and the District Attorney's Office" did not think Brian Puricelli should be working as a police officer. I replied that he would be unless I could be

given some reason why he should not be. Zellis could provide no reason for removal, so I terminated the call.

24. On or about June, 1989, while on duty and at Yardley Borough Police Headquarters, I was present, in the same room and within six to eight feet away, from Brian Puricelli, when Detective Brosha and a Pennsylvania State Police Officer named McAndrews, came to the Yardley Police Department and spoke with Brian Puricelli. The Trooper stated he was there to seize Brian Puricelli's Electronic Surveillance License. Brian turned the license over to the Trooper; although the Trooper, upon Brian Puricelli's request, had no papers authorizing seizure. Brian Puricelli asking the trooper if he thought he (Brian Puricelli) had done anything illegal in obtaining the license. The Trooper stated no, and if he had he would have obtained a warrant.

25. After the Trooper took the license, Detective Brosha approached Brian Puricelli and stated that Brian Puricelli "should not be in a police uniform", that Brian Puricelli was a habitual liar since 1979, and that Brian Puricelli was a criminal and convicted drug dealer. Brian Puricelli questioned the Detective and Trooper about the statements and I, at this time, ordered the Detective and Trooper to leave.

26. On or about July 11, 1989, while off duty and at home, and at approximately midnight, I received a telephone call to report to the Police Department. Upon arrival I discovered that Yardley Council Person Susan Taylor had been arrested. I requested Mayor Edward Robinson to come to the Police Department. I, as well as the Mayor, question Brian Puricelli, Joseph Cicolli and assisting Lower Makefield Township Police Officer Glen Hamilton about the arrest. All facts as given by these

Officers were the same, and upon Order of the Mayor, Brian Puricelli was instructed to charge Susan Taylor. Within a day or two, the Mayor stated that he was suspending the officers and directed that I so inform them that they were suspended.

27. Brian Puricelli and Officer Cicolli were both suspended; however, the Bucks County Detectives investigating the arrest related to me that they did not understand why the two officers were being suspended.

28. Brian Puricelli and his attorney did request a hearing; however, and despite no complaint ever being provided, or any charges ever being brought by either the Department or District Attorney's Office, no hearing was granted by Borough Council.

29. On or about February, 1991, Officer Cicolli was reinstated.

I, James O'Neill, having read the above do hereby swear and affirm that it is true and correct to the best of my information, knowledge and belief, and that I am aware that any intentional falsehood is punishable by law.

_____

Sgt. James O'Neill
Yardley Borough Police Department
56 S. Main Street
Yardley, PA 18977

Excerpts Brian Puricelli Testimony
[Deposition pp. 20-21; 52-58; 72]

Q. Is that a situation where you have to neither plead innocent nor guilty?

A. No, you enter a plea and a plea is set aside and it proceeds from that point on.

Q. So, you enter a plea of guilty and then you are sentenced to a period of probation?

A. That's correct.

MR. BOWE: I'll simply object and note that the characterization "sentenced" is a term of art under that statute. When he says sentenced, he's talking about disposition. That is probably different than technically what is meant by sentencing under that statute.

It is my understanding that no judgment of sentence is entered on the record.

MR. HANNA: I can accept that the statute says whatever it says. We'll have to look at it. We don't have it here.

BY MR. HANNA:

Q. In any event, you entered some type of plea, as you understand it. And then what was the disposition?

A. A probationary period. Upon successful completion of the probationary period all matters are sealed, expunged and set aside.

Q. How long was the period of probation?

A. It was three years. I finished it, I think, in two, maybe a little less.

Q. How could you finish it in two?

A. Well, there was a motion brought for early release. The government agreed with it. And I got off prior to the completion of the full term.

Q. So, your probation period was to be three years, but due to some papers that were filed during the course of that three-year period it was reduced to two?

A. Correct.

Q. So the record is perfectly clear, there was never anything like a trial in this particular matter?

A. That's correct.

Q. Now, who did Mr. Merker reveal this information to?

A. Members of the board. Thomas Herron I know for a fact.

Are we still stuck on just "while" or is "after" at this point?

Q. I am going to break it down so that my record is clear. I want to deal with the "while" first and the "after" second. And it probably would be just as easy if we did the "while" first and the "after" on each of those points together, rather than going down the "while" all of the way to the end and then coming back and redoing it.

* * *

referring to?

A. I'm not sure. I think it's either 42 or 18 U.S.C. 552 and in response to 12 (b)(6) that you filed, the numerous rules and regulations, as well as the statutes and the case law that I attached with the motion.

Q. Is it your contention that the information released by Mr. Merker caused you to lose any employment anywhere?

A. It's hard to say until I know everybody that he spoke with, until I speak with them. I believe it had partly to do with the county's investigation which caused me to lose employment in Wrightstown and in Yardley.

Q. I take your answer to mean that you're not sure at this time?

A. I'm not sure as to the extent, no.

Q. Nobody has come forward and told you that, for example, at Wrightstown you were terminated because of information that Harry Merker released?

A. No.

Q. Have you been employed while you've been going to law school?

A. Yes.

Q. As a police officer?

A. It's hard to tell. Yardley says I'm just suspended. I don't know if that constitutes employment still or what.

Q. When you've been going to law school you've been going to law school in Michigan?

A. That's correct.

Q. It's hard to work in Yardley and go to law school in Michigan.

A. The commute is difficult.

Q. The commute is difficult. While you've been out in Michigan have you been working in addition to law school or just incurring a big debt like a lot of people do when they go to law school?

A. I was employed.

Q. What types of jobs?

A. I was a legal intern for the city attorney's office.

Q. What city?

A. East Lansing.

Q. Did you hold that all of the way through law school?

A. No. I was diligent the first year, just paid attention to my studies, of course, coming back when I was asked to come back to testify in court.

Q. What I'm trying to do is make sure that I understand what jobs that you held when you were in law school.

A. The first year I held the Yardley job.

Q. In other words, you were technically an employee but you didn't actually work there?

A. Yeah. I came back during breaks, during call-backs and stuff like that.

Q. And then you stopped working at Yardley. Then did you take this other job as an intern?

A. Yes. I didn't stop. They suspended me.

Q. You can characterize it any way that you want to.

A. Well, I just want it to be clear. That's all.

Q. You were suspended by Yardley. I don't recall when that was, but you probably do.

A. July of '89.

Q. So, the job with East Lansing as a legal assistant or paralegal or whatever, that was subsequent to that date?

A. Correct.

Q. And have you fulfilled your course of employment in East Lansing? Are you done working there?

A. Oh, yes.

Q. Are you now taking like a bar review course?

A. That's correct.

Q. That's keeping you busy until the end of July?

A. Extremely.

Q. Now, you left the Borough of Morrisville in January of 1984. Apparently, you are seeking to go back to work for the Borough of Morrisville in '88?

A. That's correct.

Q. What position were you trying to get there?

A. Patrolman.

Q. In other words, basically your former job?

A. Well, since my former job had been terminated, I was looking to get the opening that they had created.

Q. When you use the term "terminated", did they cut back on the number of officers that they had on duty at the time?

A. No. In fact, they replaced me.

Q. So, in 1988 did you somehow reapply for the job?

A. Oh, yes.

Q. How did you do this? What were the mechanics of it?

A. Filed an application, took the Civil Service, went through the orals, went through the physicals, went through the psychologicals.

Q. But you contend that Harry Merker told the members of the council not to hire you?

A. That's correct.

Q. Now, Harry Merker, was he still employed by the borough at that time?

A. Yes, he was.

Q. So, he was still the police chief?

A. That's what he called himself.

Q. Fair enough. How do you know, referring to 19(b), that he told some members of the council not to hire you for the reasons ---

A. Members of the council told me.

Q. Specifically who said it to you?

A. Gail Jones.

Q. Anybody else.

A. That's it.

Q. Why would Merker have personal malice or grudges against you?

A. Because I named him as a defendant in a prior lawsuit.

Q. That the one that's still pending in Bucks County?

A. Correct.

Q. Turn to page 19. This is Count I. I don't have a lot of additional questions left. What does 38(a) refer to?

A. It refers to him accusing me of falsifying an application for wire tapping school and lying on my employment application.

Q. There must have been a question, then, on these applications pertaining to whether you had any prior arrests or convictions.

A. That's correct.

Q. So, he would have accused you of saying what with respect to those?

A. That I refused to disclose that information, that I answered no.

Q. With respect to the school applications, what application are you referring to there?

A. Electronic surveillance license.

Q. There was at a time when you were working for Yardley? I don't know what --

A. I don't understand your question.

Q. In 38(a) it says, "falsely accusing Plaintiff of criminal acts; including falsification of applications made on or about July of '88."

What applications did you make in July of 1988.

A. I think that that refers to the date when I found out about it.

Q. Do the applications that are mentioned here, do they relate back to applications that you made while you were at Morrisville.

A. Yes.

Q. In other words, the information that you learned in July of '88 pertains to matters that go back to '84 and earlier?

A. Yes.

Q. And the same thing, falsification of school applications, would that also pertain to your employment, your former employment at the borough?

A. Correct.

Q. What you refer to when you say that you first learned of these accusations, you just heard in 1989 that he had accused you of them?

A. Yes.

Q. Now, who did you speak to in June of 1989 that provided you with this information?

A. Mr. Brosha was one.

Q. So, what did Mr. Brosha tell you?

A. He said that I was a corrupt cop, that I was a compulsive liar and I shouldn't be a police officer, that I lied

on my school applications and my employment applications, that I was a convicted criminal.

* * *

Q. Now, do you know what your score was in 1988?

A. No. I know that I came out No. 1.

Q. You came out first?

A. Yes.

Q. How did you find that out?

A. Morrisville Civil Service told me.

Q. Did you ever have to appear in front of council in order to be interviewed for the position in 1988?

A. I don't recall. No.

Q. How many positions were open that year?

A. Oh, gee, I have no idea. A few. I don't know, three, four.

Q. And were you told that by the Civil Service commission.

A. Correct.

Q. And is it your position that Morrisville did not appoint you as an officer when you were the top person for the test in that year?

A. Yes.

Q. Is that your position?

A. Yes.

BOROUGH OF MORRISVILLE

FOR OFFICE USE ONLY	
Possible Work Locations	Possible Positions

APPLICATION FOR EMPLOYMENT

FOR OFFICE USE ONLY	
Work Location ____	Rate ____
Position ____	Date ____

(Please Print Plainly)

PERSONAL Date: 2/22/79

Name Puricelli (Last) Brian (First) M. (Middle Initial) Social Security No. 190-44-5146

Present address Box 186-A (No.) Upper River Rd. (Street) Washington Crossing, Pa (City, State) Telephone No. 493-5233

How long have you lived at above address? 2 months Are you a citizen? Yes

Previous address Box 264 (No.) Cox Ave (Street) Washington Crossing (City) Pa (State) How long did you live there? 9 yrs.

Date of birth 5/14/54 (Mo. Day Yr.) Sex M *** F ___ Height 5 ft. 6 in. Weight 170 lbs.

Marital Status: Single ☑ Engaged ☐ Married ☐ Separated ☐ Divorced ☐ Widowed ☐ Date of Marriage _

Number of dependents including yourself 1 Number of children 0 Their ages N/A

Do you have any physical defects? No If yes, describe _____

Have you had a major illness in the past 5 years? No If yes, describe _____

Have you received compensation for injuries? No If yes, describe _____

Position(s) applied for Patrolman Police Officer Rate of pay expected _____ per week

Would you work Full-time Yes Part-Time Yes Specify days and hours if part time Evening, weekends, holidays

Were you previously employed by us? No If yes, when? _____

List any friends or relatives working for us None

Name Relationship

None

Name Relationship

Were you ever arrested? Yes If yes, describe in full In a car not owned by me that had a controlled substance (Marihuana) in the trunk. Put on a special probation and on completion the conviction was expounged. Probation has been completed

If your application is considered favorably, on what date will you be available for work? one week after notice 19 _____

Person to be notified in case of accident or emergency

Grant Puricelli (Name) _____ (Address)

_____ (Phone Number)

Are there any other experiences, skills, or qualifications which you feel would especially fit you for work with the Township? Yes

I hold a certificate from the Pa. State Police Academy and other training in this field

Pa. Operator's Plate Number 16-733-714 Vehicle Registration No. 475-36U

The Civil Rights Act of 1964 prohibits discrimination in employment practices because of race, color, religion, sex or national origin. (Turn to Next Page)

Supreme Court, U.S.
FILED
SEP 16 1994
OFFICE OF THE CLERK

(3)

No. 94-297

In The

Supreme Court of the United States

October Term, 1994

BRIAN M. PURICELLI,

Petitioner,

vs.

MORRISVILLE BOROUGH, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. COUNTERSTATEMENT OF THE CASE

In February of 1984, Petitioner, Brian M. Puricelli (hereinafter "Puricelli"), was hired by Wrightstown Township as a part-time police officer. He was not required to take a civil service examination before his employment with the Township commenced. Thus, he never acquired civil service status, and he was both scheduled and paid on an hourly basis. In 1987, Puricelli was hired as a part-time police officer by the Borough of Yardley, and he remained employed by that Borough's police department until July 12, 1989.

In September, 1988, Puricelli left the Wrightstown Township Police Department to become a full-time law student at the Thomas Cooley Law School in Lansing, Michigan. Puricelli continued to attend law school as a full-time student until 1991, when he graduated with a juris doctor degree. Effective December 31, 1988, the Township of Wrightstown disbanded its police department. Thus, Petitioner's claim that he was terminated as a police officer by Wrightstown Township is patently false. Although Petitioner never formally resigned his position, he simply moved out of the Wrightstown area and made himself unavailable to work as a part-time officer while attending law school.

During Petitioner's employment with Wrightstown Township as a part-time police officer, the Chief of Police of Wrightstown Township, Walter Hughes (hereinafter "Hughes"), became aware from the Chief of Police of Yardley Borough that Plaintiff had a criminal record for being arrested for a drug related offense. Chief Hughes learned that this offense had taken place in the State of

Texas, and he contacted law enforcement authorities in the State of Texas and obtained written confirmation that Plaintiff had indeed been arrested for possession with intent to deliver a controlled substance. This information was turned over to the Wrightstown Township commissioners and the Township solicitor, but the decision was made not to take action against Puricelli because there was no indication that Puricelli had ever been convicted of this offense. This episode took place prior to, rather than after, the initiation of the investigation of Puricelli in February of 1988. At no time was Chief Hughes made aware that there was any type of federal court order "sealing" the case records concerning Puricelli's criminal case.

The court order in question was entered on April 14, 1983, by United States District Judge John B. Hannum of the United States District Court for the Eastern District of Pennsylvania in response to Puricelli's motion to expunge his criminal record relating to an arrest in 1976. Judge Hannum's order denied Puricelli's request for expungment, but stated as follows:

> 1. That the FBI remove its records in the criminal action from its central criminal files and place them in a separate storage facility;
>
> 2. That the FBI delete any reference to its records on any criminal or arrest record computer;
>
> 3. That the records not be opened unless the FBI determined that they were needed in the course of a bona fide criminal investigation by law enforcement agencies and only where necessary for that investigation;

4. That the United States not disseminate the records for any purpose other than the ones set forth in the Order; and

5. That the District Court Clerk's office seal the records maintained by that office.

In February of 1988, as the result of a complaint from a citizen who complained about her car being towed, Chief Hughes initiated an investigation of Puricelli's role in authorizing the towing of an unusually large number of vehicles from outside Wrightstown Township into the Township. In each case, the vehicles were being towed to an auto body shop owned by Donald Garner, a close personal friend of Puricelli. Chief Hughes approached both Puricelli and Garner in order to gather more information and to obtain an explanation as to the large number of abandoned vehicles being towed to Garner's auto body shop, but neither Puricelli nor Garner would cooperate or provide any information. Chief Hughes then met with Bucks County Detective William Brosha of the District Attorney's office of Bucks County, which office in turn conducted a preliminary investigation. This investigation was then taken before an investigating grand jury. As the result of the investigating grand jury proceedings, the District Attorney's office eventually determined that there was insufficient evidence to support a criminal conviction of Puricelli, and the investigation was then closed. Puricelli was never arrested, charged with a crime, or prosecuted.

During its investigation of Puricelli, the District Attorney's office of Bucks County contacted the Department of Public Safety in Texas to obtain background information about Puricelli. In response to this request,

the Texas authorities sent information to the District Attorney's office showing that in 1976 Puricelli had been arrested in Texas for possession of marijuana with intent to distribute. Subsequently, the District Attorney's office sought access to the court records pertaining to Puricelli's arrest, but they were denied access pursuant to Judge Hannum's order.

Since graduating from law school, Petitioner is now practicing as an attorney in Bucks County, Pennsylvania. There was no evidence of record that he was denied any law enforcement position because of this episode.

II. SUMMARY OF THE ARGUMENT

Petitioner established nothing more than a defamation claim against Defendants and was unable to meet the "reputation plus" test of *Paul v. Davis*, 424 U.S. 693, 47 L.Ed. 2d 455, 96 S.Ct. 1155 (1976).

Petitioner's claim that Defendants violated his constitutional right of privacy was never properly raised before the Court of Appeals and that court refused to address the issue. In any event, the trial court properly rejected Petitioner's claim on the basis that revelations concerning Puricelli's prior criminal record were matters of public record and were of legitimate concern to the public. The trial court properly concluded that such information is not entitled to privacy protection. The cases cited by Petitioner in his petition deal with requests for information pursuant to the Freedom of Information Act and are inapposite.

At no time before the District Court or the Court of Appeals did Petitioner raise the issue of a First Amendment violation. Thus, any such issue is now waived.

Similarly, Petitioner never raised any Fourth Amendment claim before the Third Circuit Court of Appeals, and this issue should be considered waived.

Petitioner's malicious prosecution/abuse of process claim was never raised before the Court of Appeals and should also be considered waived. Petitioner's claim was properly rejected by the District Court because Petitioner never established that process was ever issued inasmuch as he was never charged with a crime, indicted or arrested. The District Court held that any investigation of Petitioner's suspected criminal activity was insufficient to state a claim for malicious prosecution or abuse of process.

The Court of Appeals correctly affirmed the trial judge's refusal to recuse herself inasmuch as Petitioner's request was not timely, in that it was made only after the trial court ruled on Defendants' Motion for Summary Judgment; it was not properly made, in that it was made by a letter from Petitioner himself to the judge; and it was substantively without merit.

At no time before the District Court or the Court of Appeals did the Petitioner raise the issue of diversity jurisdiction over the pendent state claims. Thus, said issue is waived.

Petitioner's claim concerning a violation of his Fourteenth Amendment right to procedural due process was never properly raised before the Court of Appeals and is

also waived. Furthermore, Petitioner failed to establish that he had a protected property interest in his employment as a part-time police officer.

III. ARGUMENT

Petitioner has failed to cite any of the considerations set forth in Rule 10 of the Supreme Court rules. The decision of the Court of Appeals for the Third Circuit is not in conflict with the decision of any other Court of Appeals nor is it in conflict with the decision of a state court of last resort. The Court of Appeals did not greatly depart from the accepted and usual course of judicial proceedings nor did it sanction such a departure by the District Court in this matter. Instead, the Court of Appeals has merely applied the "reputation plus" test enunciated by this Court in *Paul v. Davis*, 424 U.S. 693 (1976). Thus, there is no reason why this Honorable Court should grant the petition in this matter.

The Petitioner in this matter is rambling, unfocused, and at times incoherent. Thus, providing a meaningful response is difficult, at best. The Court of Appeals was faced with the same difficulty, and in light of Petitioner's blatant disregard of the local rules of the Court of Appeals concerning the contents and length of briefs, it is not surprising that the Court gave Petitioner's arguments short shrift.

Petitioner alleged in this case that Chief Walter Hughes and members of the Bucks County District Attorney's office defamed him by mentioning to various individuals that Petitioner was involved in a chop shop, that Petitioner was the subject of a grand jury investigation,

and that Petitioner had a criminal record. The District Court correctly held that Petitioner was unable to establish any tangible injury such as loss of employment in connection with the defamatory remarks attributed to Chief Hughes and the Bucks County Defendants. Indeed, Petitioner continued to work for Wrightstown Township as a part-time police officer until he voluntarily left for law school in September of 1988. At that time, Petitioner left the eastern Pennsylvania area and moved to Michigan, where he enrolled as a full-time law student at Thomas Cooley Law School in Lansing, Michigan. Shortly thereafter, on December 31, 1988, the police force for Wrightstown Township was disbanded, and police protection for Wrightstown Township was undertaken pursuant to a purchase of service contract with a neighboring municipality. Thus, the trial court correctly held that Petitioner's "claim is nothing more than a state defamation action masquerading as a Section 1983 claim." A.52. The trial court correctly rejected Petitioner's response that Pennsylvania regards reputation as a fundamental interest such that harm to reputation alone constituted a viable claim under Section 1983. Petitioner cites no caselaw from any other Court of Appeals which would dictate a contrary result. Thus, this Honorable Court should refrain from expanding the "reputation plus" test enumerated in *Paul v. Davis, supra,* by eliminating the "plus" element of that test.

The trial court properly dismissed Petitioner's claim that Defendants violated his right to privacy when they revealed that Petitioner was the subject of a grand jury investigation, claimed that he was running a "chop shop"

and stated that he had an arrest record for drug smuggling. As the Court of Appeals correctly noted in its Memorandum Opinion, the court order of Judge Hannum ordering the FBI to remove his criminal record from its criminal files and store it separately and ordering the clerk's office for the Eastern District of Pennsylvania to seal the record in Petitioner's criminal prosecution did not bind any of the Defendants in this matter.

Citing *Scheetz v. The Morning Call, Inc.*, 946 F.2d 202, n.5 (3rd Cir. 1991), *cert. denied*, 112 S.Ct. 1171 (1992), the trial court went on to hold that the type of information disclosed was not the type of "private" information protected by the United States Constitution. The trial court correctly noted that the type of information revealed in this case was remarkably similar to the information revealed in *Paul v. Davis, supra*, wherein this Honorable Court held that the plaintiff's claim that disclosure of the fact of his arrest on a shoplifting charge did not give rise to constitutional protection under the "right of privacy" line of cases.

Petitioner cites no authority for his contention that he has a constitutionally protected privacy interest in his criminal history and the grand jury investigation of which he was a subject. The case of *Department of Justice v. Reporters Comm.*, 489 U.S. 749, 103 L.Ed. 2d 774, 109 S.Ct. 1468 (1989), cited by Petitioner, merely stands for the proposition that disclosure of FBI rap sheets to private citizens does not fall within any of the exemptions set forth in the Freedom of Information Act, 5 U.S.C. § 552 in that such a request could be expected to invade a citizen's privacy. Such a holding is not even remotely similar to a

determination that discussions by law enforcement officials concerning the criminal arrest record of the subject of an investigation violate a constitutionally protected right of privacy. Thus, Petitioner has failed to cite any convincing reason for this Court to review the decision of the Court of Appeals on this issue.

With regard to Petitioner's First and Fourth Amendment claims that a criminal investigation was instituted against him as the result of his reports of corruption and wrong doing in the Wrightstown Police Department, those issues were never properly raised before the Court of Appeals. Indeed, the First Amendment claim was not even raised before the District Court. As to the Fourth Amendment claiming the District Court correctly held that since Petitioner was never charged with a crime, indicted or arrested, he failed to state a claim for abuse of process or malicious prosecution. Petitioner argues that the initiation of an investigatory grand jury and the issuance of subpoenas constituted sufficient "process" to constitute an abuse of process; however, Petitioner cites no caselaw in support of that contention. Petitioner seeks to impose a constitutional duty on law enforcement officers to establish probable cause before they can initiate an investigation or take a case before an investigatory grand jury. This is placing the cart before the horse. Such a rule would effectively preclude law enforcement officials from conducting investigations in most cases, since the purpose of an investigation is to make a determination as to whether probable cause for arrest is present against the person being investigated. Most investigations would simply never get off the ground if they required the existence of probable cause prior to initiation. Once

again, Petitioner has cited no caselaw in support of this novel proposition. Thus, this Court should refuse to review this matter further.

Petitioner next argues that the trial judge should have recused herself in this matter. This issue was waived before the trial court in that Petitioner never filed a formal motion seeking recusal, and his request for recusal was not timely. He waited until after the judge ruled on Defendants' Motions for Summary Judgment until he made his request and even then he requested recusal through a letter to the judge rather than by formal motion. Moreover, said request lacked substantive merit. The only basis for Petitioner's request is that Defendant, Alan Rubenstein, who was the District Attorney of Bucks County, had campaigned with the trial judge during her unsuccessful campaign for election to the Pennsylvania Supreme Court, that he had attended several fund raising events on her behalf, and that he had given her a tour of the Bucks County Criminal Justice facilities when the trial judge was sitting as a judge on the Court of Common Pleas of Montgomery County, Pennsylvania. The Third Circuit Court of Appeals found Petitioner's claim "to be plainly without merit." Petitioner has cited nothing in his present petition to disturb that conclusion.

Petitioner argues that the trial court improperly dismissed the pendent state claims inasmuch as Petitioner had established diversity jurisdiction. Once again, this issue was never raised before the trial court nor before the Court of Appeals. Petitioner seeks to raise this issue for the first time before this Court and does so without specifying what state claims he seeks to make. Petitioner

should not be permitted to raise such an argument for the first time at this stage of the litigation.

Finally, Petitioner argues that he held a protectable property right in his employment as a part-time police officer with Wrightstown Township and that he was denied that right without procedural due process. The Court of Appeals correctly concluded that Petitioner held no protectable property interest in his employment under state law. Wrightstown Township, as a second class township under Pennsylvania law, is governed by the Police Tenure Act of June 15, 1951, P.L. 586, 53 P.S. § 811 *et seq.*, which extended civil service protection only to a "regular full-time police officer." 53 P.S. § 812. A regular full-time police officer is defined as one who is "available or on call for duty at any and all times." *Mullen v. Borough of Parkesburg*, 132 Pa. Commonwealth Ct. 321, 572 A.2d 859 (1990). The record in this case reflects that Puricelli was a part-time non-salaried employee who was paid by the hour. At the time of his hire, Petitioner never took nor passed a civil service examination. While employed as a police officer by Wrightstown Township, Petitioner was working concurrently as a part-time police officer with the Borough of Yardley. Thus, the record is clear that Petitioner was not available for duty at any and all times with Wrightstown Township and could not be classified as a regular full-time police officer. Moreover, the record is clear that Wrightstown Township did not terminate Petitioner's employment. To the contrary, Petitioner left the employment of the Township to enroll as a full-time law student in the State of Michigan. Several months later, the police force for Wrightstown Township was disbanded, and all police officers, including the Chief of

Police, were laid off. Since Petitioner voluntarily left the employ of Wrightstown Township, process was due. Thus, the Court of Appeals properly concluded that Petitioner had failed to establish a due process claim.

In conclusion, Petitioner has set forth no compelling reason why this Court should grant his petition in this case. Petitioner has not demonstrated that the decision of the Court of Appeals in this matter is at odds with decisions of other courts of appeal or of any state courts. Instead, Petitioner makes a rambling and disjointed argument that the Court of Appeals incorrectly decided his appeal and, therefore, he is entitled to further review by this Court. Petitioner includes arguments not properly raised before the trial court or the Court of Appeals, he asks this Court to ignore his failure to abide by the Rules of Civil Procedure and local rules before the trial court and the Court of Appeals, and he repeatedly misstates the facts contained in the record. Respondent respectfully suggests that this Honorable Court not waste its resources on a case with so little merit as this one. Accordingly, Respondent respectfully requests that Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 94-297

In The

Supreme Court of the United States

October Term, 1994

BRIAN M. PURICELLI,

Petitioner,

vs.

MORRISVILLE BOROUGH, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS WRIGHTSTOWN TOWNSHIP, GEORGE DONAT, KEN CRONLUND, YARDLEY BOROUGH, SUSAN TAYLOR AND EDWARD ROBINSON

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COUNTERSTATEMENT OF THE CASE

Between 1979 and 1989, Puricelli, worked as a part-time police officer for Wrightstown Township and the Boroughs of Yardley and Morrisville. Puricelli alleges that the causes of action arose while he was employed by these police departments.

Puricelli worked as a part-time police officer for the Borough of Morrisville ("Morrisville") from 1979 to 1984 when he was discharged.[1] When he applied for employment with Morrisville, Puricelli stated on his employment application that he had been arrested, convicted and had served a term of probation for possessing a controlled substance.[2] Chief Merker ("Merker") of the Morrisville police force investigated and fleshed out the circumstances surrounding Puricelli's arrest.

In February 1984, after his discharge from the Morrisville police force, Puricelli applied for and received a part-time position with the Wrightstown Township ("Wrightstown") police force.

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1. The Morrisville police force terminated Puricelli in January of 1984. (Puricelli Depo. of 7/2/91 at 10).

2. On July 19, 1976, Puricelli was arrested in Texas and charged with the possession of marijuana with the intent to deliver. Puricelli was convicted of these charges and received two years of probation. On November 16, 1978, Judge Hannum, of the Eastern District of Pennsylvania, entered an order discharging Puricelli from probation and setting aside his conviction pursuant to 18 U.S.C. § 5021(b). On April 14, 1983, Judge Hannum denied Puricelli's request to expunge his criminal record and ordered that Puricelli's records, maintained by the Federal Bureau of Investigation, be removed from the central criminal file and placed in a separate storage facility. Pursuant to this order, these records may not be opened "unless the Federal Bureau of Investigation determines they are needed in the course of a *bona fide* criminal investigation . . . the United States [may] not disseminate these records to anyone . . . for any purpose other than as set forth above." Judge Hannum further ordered the F.B.I. to delete Puricelli's criminal record from the computer and the Eastern District of Pennsylvania to seal its records pertaining to Puricelli.

(Puricelli Depo. of 7/2/91 at 82-83). During his tenure with the Wrightstown police force Puricelli and Chief Walter Hughes ("Hughes") became embroiled in several disputes.[3] Despite their differences, Puricelli worked for Wrightstown until September 1988 when he moved to Michigan to begin law school.[4] The Wrightstown police force disbanded on December 31, 1988.

During the last six months of his employment with Wrightstown, Puricelli became the subject of a criminal investigation involving an investigatory grand jury. This investigation, conducted by Dale Reichley, an assistant district attorney for Bucks County and Detectives Brosha and Armitage, also of the Bucks County District Attorney's office, centered upon Puricelli's possible involvement in the alleged mishandling of abandoned cars in the area.[5] The investigation did not result in the

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3. According to Puricelli, their troubles began when Hughes asked Puricelli to fix a ticket. Puricelli refused and reported this request to Alan Rubenstein ("Rubenstein"), the Bucks County District Attorney. (Puricelli Depo. of 7/2/91 at 85-87). Hughes then began cutting Puricelli's work hours. (*Id.* at 89-92). Eventually, both men contacted the Bucks County District Attorney's office and other law enforcement agencies to lodge complaints about each other. These complaints resulted in an investigation of Puricelli and his involvement in an allegedly unlawful abandoned car scheme but did not result in any investigation of Chief Hughes' supposedly improper conduct.

4. Puricelli maintains that he obtained an educational leave of absence from Ken Cronlund, a member of the Wrightstown Board of Supervisors. (Puricelli Depo. of 7/2/91 at 168). However, on November 30, 1988, Terry Clemons, solicitor for Wrightstown, sent Puricelli a letter which stated that "the Township considers your dropping off your keys at the Township Police Department in August of 1988 and not making yourself available for police duty, is an effective resignation from the Wrightstown Township Police Department."

5. In September 1987, Hughes granted Puricelli permission to establish and maintain an abandoned vehicle and towing file for the Wrightstown police force. (Puricelli Affidavit of 8/19/92 at ¶ 4). In February 1988, a member of the

(Cont'd)

filing of any charges against Puricelli or in his arrest, and the investigatory grand jury disbanded without indicting him. However, during the course of the investigation, Hughes, Reichley, Brosha and Armitage interviewed law enforcement officers and other members of the community about Puricelli and discussed with them Puricelli's criminal record and his status as the subject of a grand jury investigation.[6]

(Cont'd)
community contacted Hughes about a car that was in the possession of an automobile salvage business owned by Donald Garner, plaintiff in the related case of *Garner v. Township of Wrightstown et al.*, 90 CV-1228. Hughes knew that Garner and Puricelli were friends and that Puricelli helped Garner with the paperwork for his business. (Puricelli Depo. of 10/22/91 at 71; Report prepared by Detective Brosha). Hughes searched the police files to determine what action the Wrightstown police force took concerning the car in issue. (Brosha Report). While searching the files, Hughes noticed Puricelli's signature on a large number of abandoned vehicle reports and that Puricelli had not included the usual paperwork as required by the Wrightstown police force's procedures for handling vehicles abandoned within its borders. (Brosha Report).

6. During the course of his own investigation, Hughes contacted James O'Neill, supervisor for the Yardley police department, Robert Cressman, a member of the Wrightstown police force and Martin Duffy, chief of police for Newtown Township. (*See* Affidavits of O'Neill, Cressman and Duffy). In particular: (1) Hughes asked O'Neill if he was going to fire Puricelli because of the grand jury's investigation into the abandoned car scheme; (2) Hughes talked about Puricelli at a Wrightstown police force meeting and told Cressman about Puricelli's drug conviction and his involvement in the alleged abandoned car scheme; and (3) Hughes spoke with Duffy about Puricelli's alleged involvement in an illegal method of disposing of abandoned cars. (O'Neill Affidavit at ¶ 19, Cressman Affidavit at ¶¶ 8, 9(b) and Duffy Affidavit at ¶ 2).

During the course of the investigation conducted by the Bucks County District Attorney's office, Reichley, Brosha and Armitage also met with other police officers and community members and told them of Puricelli's criminal record and the grand jury investigation. In particular, Brosha met with O'Neill,
(Cont'd)

In 1987, Puricelli obtained part-time employment with the Borough of Yardley ("Yardley") police force. (Puricelli Depo. of 7/2/91 at 182). He worked for Yardley until July 1989 when he was suspended because of a complaint filed against him by Susan Taylor, a defendant in this action and then a member of the Yardley Borough Council.[7]

During 1988, Puricelli again sought employment with the Morrisville police force. (Puricelli Depo. of 7/2/91 at 55). Although he received the top score on the civil service examination, Puricelli failed the psychological examination and consequently did not receive a position with the police force. (Puricelli Depo. of 10/22/91 at 193).[8]

(Cont'd)

told him that Puricelli should not be a police officer because he was a "convicted drug dealer" and asked to see Puricelli's personnel file. (O'Neill Affidavit at ¶ 6). O'Neill refused to let him do so and Brosha returned with a subpoena compelling O'Neill to appear before the grand jury with the personnel file. (*Id.* at ¶¶ 10, 13). Also, Reichley and Armitage met with Cressman and told him that Puricelli and Garner were running a chop shop and that Puricelli was a convicted drug smuggler. (Cressman Affidavit at ¶ 2(d)).

7. Edward Robinson, then the Mayor of Yardley and a defendant in this action, suspended Puricelli and a fellow arresting officer after they arrested and filed criminal charges against Taylor for possession of a controlled substance and driving under the influence of alcohol and a controlled substance. (Puricelli Depo. of 7/2/91 at 204; James O'Neill's Affidavit at ¶¶ 26-27).

8. Puricelli challenged his failure to receive this position at a hearing before the Civil Service commission, held at his request. (Puricelli Depo. of 10/22/91 at 193, 212). The Civil Service Commission issued a letter to Puricelli in which it stated that his name was removed from the list of eligible candidates for employment with the Morrisville police force. (Puricelli Depo. of 10/22/91 at 195).

SUMMARY OF ARGUMENT

Puricelli failed to meet the "reputation plus" test of *Paul v. Davis*, 424 U.S. 693, 47 L. Ed. 455, 96 S. Ct. 1155 (1976) and thus his claims against defendants amounted to nothing more than a defamation claim.

The trial court properly rejected Puricelli's claim that his constitutional right of privacy was violated by defendants when his criminal record was disseminated on the grounds that Puricelli's criminal record was a legitimate public concern, and that such information is not entitled to privacy protection.

The right of privacy issue was not properly raised on appeal; thus, the Court of Appeals refused to address that issue.

Puricelli has waived any violation of his First Amendment rights by failing to properly raise them before the trial or appellate courts. Also, Puricelli's Fourth Amendment claim was not raised before the appellate court, and it is deemed waived.

Similarly, Puricelli failed to properly raise his malicious prosecution/abuse of process claim to the appellate court and it should also be considered waived. The District Court properly held that mere investigation into Puricelli's suspected criminal activity, without arrest or indictment, was insufficient to support a claim for either malicious prosecution or abuse of process.

The Court of Appeals affirmed the trial court's decision that Puricelli's claim that the trial judge should have recused herself was untimely, and improperly made and substantively without merit. By failing to raise the diversity issue before the District Court or the Court of Appeals, Puricelli has waived his right to raise it now.

Puricelli's claim with respect to his Fourteenth Amendment right to procedural due process was not properly raised before the appellate court and is deemed waived. Furthermore, Puricelli failed to establish that he had a protected property interest in his employment as a part-time police officer.

REASONS FOR DENYING THE WRIT

Puricelli is asking this Honorable Court not to expand the "reputation plus" test set forth in *Paul v. Davis*, 424 U.S. 693 (1976), but to eliminate the "plus" element of that test altogether. Since Puricelli has failed to convince either the District Court of the Third Circuit Court of Appeals that he had anything more than a defamation claim without any tangible injury which could be attributed to any defamatory remarks, he now asks that the evidence of actual injury, or the "plus" part of the test be eliminated. The Third Circuit, in affirming the District Court's decision, did not depart from accepted judicial procedure, but merely correctly applied the "reputation plus" test of *Paul v. Davis*, *supra*. Puricelli gives this Honorable Court no reason to grant his petition under Rule 10 of the Supreme Court Rules.

Puricelli claims that his right to privacy was violated by defendants when an investigation by the grand jury into his possible criminal activity in connection with operating a "chop shop" was begun, and his prior criminal record was disseminated. Puricelli claims the court order sealing his criminal record was directly violated by defendants. The District Court properly dismissed this claim based on the holding in *Scheetz v. The Morning Call, Inc.*, 946 F.2d 202, n. 5 (3rd Cir. 1991), *cert. denied*, 112 S. Ct. 1171 (1992). The District Court opined that the type of information disclosed was not the type of "private" information protected by the United States Constitution, but rather remarkably similar to the information revealed in *Paul v. Davis, supra*. Puricelli has failed to cite any convincing authority for his

contention that his criminal history is constitutionally protected as "private", and therefore, has not given this Honorable Court any reason to review the appellate court's decision on this issue.

Puricelli claims that his First and Fourth Amendment rights were violated by defendants when a criminal investigation against him was commenced because he reported alleged acts of corruption and wrongdoing by the Wrightstown Police Department, were not properly raised before the appellate court. As to his Fourth Amendment claim for malicious prosecution and abuse of process, the District Court properly held that since Puricelli was never arrested, indicted, or charged with a crime, subsequent to the grand jury investigation, Puricelli failed to establish essential elements of those claims. Since Puricelli could cite no case law to the contrary, this Honorable Court has no reason to review this issue.

After the District Court's decision granting summary judgment to all defendants, Puricelli wrote a letter to the judge demanding she recuse herself, based on Alan Rubenstein's limited participation in her unsuccessful campaign for election to the Pennsylvania Supreme Court. The District Court's decision was affirmed by the Third Circuit, finding Puricelli's claim "to be plainly without merit." Puricelli has cited no case law in his present petition to convince this Honorable Court that this issue deserves review.

Puricelli now seeks to have this Court decide his pendent state claims, whatever they may be, on the basis of diversity jurisdiction. Since Puricelli did not heretofore raise this issue, he should be precluded from now doing so.

Puricelli finally argues that he has a protectable property right as a part-time police officer with Wrightstown Township, and his procedural due process was denied. As a second class township

under Pennsylvania law, the Police Tenure Act of June 15, 1951, P.L. 586, 53 P.S. § 811, *et seq.* is the applicable law. Clearly, the record indicates that Puricelli was not a full-time police officer, as is required. Also, Puricelli voluntarily left his employment at Wrightstown to become a full-time law student in Michigan. The Court of Appeals properly concluded that Puricelli had no protected property interest in his employment and that no process due him was denied.

CONCLUSION

In conclusion, Puricelli has given this Honorable Court no compelling reason to grant his petition and we respectfully request this Honorable Court to deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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